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Protection of persons in the event of disasters

Comments and observations received from Governments and international organizations

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I. Introduction

1. At its sixty-sixth session, held in 2014, the International Law Commission adopted, on first reading, the draft articles on the protection of persons in the event of disasters (A/69/10, para. 51). Moreover, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, competent international organizations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2016. The Commission also indicated that it would welcome comments and observations on the draft articles from the United Nations, including the Office for the Coordination of Humanitarian Affairs and the secretariat of the International Strategy for Disaster Reduction, by the same date (ibid., para. 53). By paragraph 6 of its resolution 69/118 of 10 December 2014, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles by 1 January 2016. The Secretary-General circulated a note dated 26 November 2014 transmitting the draft articles on the protection of persons in the event of disasters to Governments and inviting their comments in accordance with the request of the Commission. The draft articles were also sent to competent international organizations and entities by circular notes in October 2014, inviting them to provide comments.

2. As at 29 February 2016, written comments had been received from Australia (8 January 2016), Austria (12 January 2016), Cuba (2 February 2016), the Czech Republic (1 January 2016), Ecuador (11 February 2015), Finland (also on behalf of Denmark, Iceland, Norway and Sweden) (18 December 2015), Germany (29 May 2015), the Netherlands (30 December 2015), Qatar (12 March 2015) and Switzerland (12 January 2016).

3. As at 29 February 2016, written comments had also been received from the following 11 international organizations and entities: Office for the Coordination of Humanitarian Affairs (23 December 2015); secretariat of the International Strategy for Disaster Reduction (8 December 2015); World Food Programme (WFP) (21 January 2016); Food and Agriculture Organization of the United Nations (FAO) (14 January 2016); World Bank (3 November 2014); International Organization for Migration (IOM) (18 January 2016); Association of Caribbean States (28 January 2016); Council of Europe (25 November 2014); European Union (17 December 2015); International Committee of the Red Cross (ICRC) (19 January 2016); and International Federation of Red Cross and Red Crescent Societies (IFRC) (21 January 2016).

4. The comments and observations received from Governments, international organizations and entities are reproduced below, organized thematically as follows: general comments; comments on specific draft articles; and comments on the final form of the draft articles.

A. General comments and observations received from Governments

Australia

Australia is hopeful that the Commission's work in highlighting the complex array of challenges inherent in international disaster risk reduction and response, coupled with the adoption in March 2015 of the Sendai Framework for Disaster Risk Reduction 2015-2030 (hereinafter "Sendai Framework")[1] will reinforce continued international cooperative efforts. Initiatives such as the Sendai Framework, aimed at encouraging collaboration and the development of relationships of trust, are central to the provision of quality, flexible and tailored assistance in both situations of large-scale disasters (as contemplated by draft article 3 [3] of the draft articles) and recurring small-scale and slow-onset disasters.

Insofar as the draft articles consolidate existing rules of international law, Australia considers that they will usefully serve as a guide for States in implementing their prevailing international obligations.

To the extent that the draft articles also seek to progressively develop the law relating to the protection of persons in the event of disasters, Australia would encourage further discussion as to whether the proposed creation of new duties for States or the novel application of principles drawn from other areas represent the most effective approach. Australia emphasizes the importance that the Commission's work be received with the broadest possible consensus; progressive development of the law in this field pursued too rapidly may raise an impediment to achieving such consensus.

Australia would wish to see a careful balance struck between those elements of the draft articles which may encroach on the core international law principles of State sovereignty and non-intervention as against the likelihood that their implementation will effectively assure tangible and practical benefits in terms of reducing the risk of, ameliorating the effects of or improving recovery from disasters.

Czech Republic

We especially appreciate that the Commission struck a balance among the principles of non-intervention and sovereignty as expressed mainly in draft articles 12 [9], 14 [11] and 15 [13] and the humanitarian principles and human rights that guide the provision of assistance by the assisting actors to the affected State and which are a cornerstone of the draft articles.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

The draft articles present a coherent set of codified norms in an increasingly relevant area of public international law. The Nordic countries are strong supporters of further strengthening the international disaster relief and humanitarian assistance system and the present draft articles are a valued contribution to that purpose.

The preparation of the draft articles has involved finding a balance between different interests, most notably, on the one hand, the aspects of State sovereignty and the needs of international cooperation in protecting persons and providing

[1] General Assembly resolution 69/283, annex II.

humanitarian assistance in the event of disasters, on the other. As reaffirmed several times during the drafting process in the Sixth Committee, it is the primary responsibility of the affected State to ensure the protection of persons affected by a disaster, as well as the provision of disaster relief.

The draft articles set a clear duty for the State affected by a disaster to initiate, organize, coordinate and implement external assistance within its territory when necessary and, in the absence of sufficient national response capacity or will, to seek external assistance to ensure that the humanitarian needs of the affected persons are met in a timely manner. The Nordic countries salute the particular attention given to the needs of the individuals affected by disasters, with full respect for their rights. In this regard, it must be highlighted that some people may be particularly vulnerable to abuse and adverse discrimination due to their status (age, gender, race, etc.) and may require special measures of protection and assistance.

The Nordic countries would also like to highlight the diverse roles of other actors, such as intergovernmental, regional and relevant non-governmental organizations or other entities, like ICRC and IFRC, as referred to in the draft articles. As the number of different actors has increased and continues to do so, their coordination and interoperability becomes critically important when providing external assistance.

Germany

In general, the draft articles provide good recommendations supporting international practice and domestic legislation to establish effective national systems of disaster prevention, mitigation, preparedness and response.

Netherlands

Given their overall quality, the draft articles are expected to play an important role in improving the protection of persons affected by disasters, in particular in situations where the scale of a disaster exceeds the response capacity of the affected State.

B. General comments and observations received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs is in broad agreement with the substance of the draft articles. The Office is pleased that the focus of the draft articles is on persons in need, coupled with a rights-based approach, as set out in draft articles 1 [1] and 2 [2].

Secretariat of the International Strategy for Disaster Reduction

The work of the Commission on the topic constitutes a critical and timely contribution to the efforts of States and other stakeholders to manage disaster risk.

Overall, there is a strong alignment and complementarity as well as a functional relation between the draft articles and the Sendai Framework, in that the former articulates the duty to reduce the risk of disasters and to cooperate, and the

latter articulates modalities and measures that States need to adopt to discharge such duty.

World Food Programme

WFP welcomes the draft articles as it shares their inherent objective — the protection of persons in the event of disasters. WFP especially welcomes the real progress that the draft articles could make in advancing the development of rules in this area as well as in the field of disaster prevention and relief assistance. Of particular interest to WFP are the provisions concerning the prevention of disasters (draft articles 10 [5 ter] and 11 [16]); the responsibility of the affected State to seek assistance where its national response capacity is exceeded (draft article 13 [10]); and the conditions on the provision of assistance (draft article 15 [13]).

Other provisions, such as the duty to protect relief personnel, equipment and goods (draft article 18); the duty to cooperate (draft articles 8 [5], 9 [5 bis], 10 [5 ter] and 11 [16]); the facilitation of external assistance (draft article 17 [14]); and the question of termination of external assistance (draft article 19 [15]) are also relevant to WFP operations.

WFP would welcome further discussion with regard to the adoption of common international standards through either the development of additional technical annexes concerning detailed aspects of relief assistance or through the establishment of a specific technical body comprising experts of States parties or a secretariat whose responsibility is to perform additional tasks related to the development of technical standards.

International Organization for Migration

The text of the draft articles and the commentaries, in its present drafting, does not reflect the importance of issues related to human mobility in the context of disasters. The only two mentions of this topic are a quote from the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and International Recovery Assistance, adopted by IFRC in 2007,[2] referring to displaced persons, among other vulnerable groups, in paragraph (7) of the commentary to draft article 7 [6]; and a mention of internally displaced children in paragraph (5) of the commentary to draft article 13 [10].

The second issue of concern for IOM is the specific plight of migrants in disaster situations. This is an issue that has attracted increased attention from States. In the commentary to draft article 1 [1], it is specified that the draft articles apply to all persons present on the territory of the affected State, irrespective of nationality. However, the following draft articles do not fully reflect the importance of taking into account the specific vulnerability of those who do not have the nationality of the affected State in disaster situations. Furthermore, no reference is made to the need to ensure access of foreign States to their nationals, including for the purpose of evacuation when protection and assistance in situ cannot be guaranteed.

[2] International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and International Recovery Assistance*, Geneva, 2007.

Council of Europe

We express our satisfaction with this work of the Commission, which to us is just a first step in the direction of protecting the rights of people in emergency situations associated to disasters. We hope that in future work more attention will be devoted to vulnerable groups (children, including orphans, people with disabilities, migrants asylum seekers and other people who are at greater risk because of their limited means or other reasons). We also hope that appropriate attention will be given in the future to prevention, including education for risk and preparedness. Also the right of victims to receive aid for recovery of their lives after a disaster is, in our view, important. It would be useful that the draft articles consider the whole of the disaster cycle (preparation, emergency response and recovery).

European Union

The European Union welcomes the present draft set of articles as an important contribution to international disaster law. The topic is of special interest for the European Union, especially in view of its activities in the field of humanitarian action and civil protection.

A principal general comment is the need for the draft articles to allow sufficient room for the specificities of the European Union as a regional integration organization.

International Committee of the Red Cross

ICRC commends the Commission for the work on the draft articles and their commentaries, on the understanding that the latter form an integral part of the former. Recent events have illustrated the importance of the subject and the necessity to consolidate the legal framework governing the protection of persons in the event of disasters. In this regard, ICRC has no doubt that the draft articles will constitute an important contribution to contemporary international law in line with the leading role played by the Commission in its codification and progressive development.

The comments of ICRC have been made mainly with a view to preserving: (a) the integrity of international humanitarian law; and (b) the ability of humanitarian organizations such as ICRC to conduct, in times of armed conflict (be they international or non-international, even when occurring concomitantly with natural disasters), their humanitarian activities in accordance with a neutral, independent, impartial and humanitarian approach.

International Federation of Red Cross and Red Crescent Societies

IFRC feels that the draft articles have a number of strong elements, including their emphasis on human dignity, human rights, cooperation and respect for sovereignty as well as on disaster risk reduction.

However, the text can also be strengthened in several respects. As currently drafted, the draft articles are not yet sufficiently operational to have a direct impact on the most common regulatory problem areas in international response. They are also overly cautious with regard to the issue of protection, notwithstanding their title. IFRC would also like to underline its concern about how the issue of armed conflict is addressed by the commentary to the draft articles, as it feels that the

current text could inadvertently undermine the protection of international humanitarian law.

It is also very positive that the draft articles refer to non-state humanitarian actors in several draft articles. This is very important given the important contributions they make in disaster response and the need to also bring them within a regulatory framework (even if not precisely the same as that applicable to States).

IFRC feels that the text has missed some opportunities. Chief among these is the abbreviated approach taken to the "rules of the road" for international operations (see the comments below on draft articles 15 [13] and 17 [14]).

II. Specific comments on the draft articles

A. Draft article 1 [1] — Scope

1. Comments received from Governments

Qatar

Qatar proposes the following amendment to draft article 1 [1]: "The present draft articles apply to the protection of persons in the event of disasters *and other similar events*."

2. Comments received from international organizations and entities

International Organization for Migration

In regard to the scope of application of the draft articles *ratione materiae* it would be important to recall in the commentary that States have the obligation to protect all persons present on their territory, irrespective not only of nationality but also of legal status.

Furthermore, the choice of the commentary to expressly state that the focus of the draft articles is primarily on the rights and obligations of States in relation to one another, and to a lesser extent on the rights of individuals, is hardly justifiable in light of both the topic of the protection of persons in the event of disasters and the contemporary recognition of the importance of human rights in disaster situations. This importance is clearly demonstrated by the increased attention paid to this issue by United Nations human rights bodies, as well as regional international courts. The draft articles represent an important opportunity to clarify how the human rights framework applies in the context of disasters. Moreover, an approach based on human rights can help in finding the right balance between the individual and the general interests that are at stake in disaster situations.

Paragraph (4) of the commentary to draft article 1 [1] states that the draft articles focus primarily on the immediate post-disaster response and recovery phase, including the post-disaster reconstruction phase. Then it reads: "Nonetheless, the draft articles also, in draft articles 10 [5 ter] and 11 [16], where relevant, cover the pre-disaster phase as relating to disaster risk reduction and disaster prevention and mitigation activities." In the present wording it seems that obligations regarding the pre-disaster phase are only those addressed in draft articles 10 [5 ter] and 11 [16]. The reference to "where relevant" could be used to extend State obligations to the

pre-disaster phase also with regard to other provisions such as draft article 6 [8], where obligations in the area of prevention are particularly relevant.

It is also suggested that "early" be added to "recovery phase", and this adjective would apply also to the following reference to the reconstruction phase. The sentence would then read: "... on the immediate post-disaster and early recovery phase, including the post-disaster reconstruction phase". This change would allow clarifying that it is only the reconstruction activities that start right after the disaster that are included. It is important to ensure that the scope of application of the draft articles, notably *ratione temporis*, is clearly determined, particularly because the pre-disaster (disaster risk reduction or management) and the post-disaster (recovery and reconstruction) phase can involve the intervention of completely different actors, not only humanitarian organizations, but also those dealing with development issues. The parameters of intervention of these various actors can be quite different; therefore, it is suggested that the more long-term recovery and reconstruction phase be excluded from the scope of application of the draft articles.

World Food Programme

WFP would submit for consideration whether the provisions concerning the scope and purpose of the draft articles could benefit from a clarifying reference to prevention and disaster risk reduction.

B. Draft article 2 [2] — Purpose

1. Comments received from Governments

Austria

The formulation of draft article 2 excludes the application of the draft articles to any activity relating to the avoidance or the reduction of disaster risk, an issue that is addressed, for instance, in draft articles 10 [5 ter] and 11 [16].

From a linguistic perspective it is pointed out that it is unknown to which noun the conjunction "that" relates; the text should be reformulated to make clear that the conjunction "that" relates to "response".

Qatar

Qatar proposes the following amendment to draft article 1 [1]: "The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full *and unrestricted* respect for their rights."

Switzerland

Switzerland notes that the exclusion of armed conflicts, which was initially contained in an earlier version of draft article 2 [2] of the draft articles, has been removed, thus giving rise to the question of how the draft articles cover situations of armed conflict in which disasters occur. [See also the comment below on draft article 21.]

2. Comments received from international organizations and entities

International Organization for Migration

It is suggested that a paragraph be added in the commentary to expressly acknowledge that those displaced by a disaster are also to be considered as being directly affected. Such express reference to this group can be justified in light of the scale of displacement in relation to disasters and with a view to drawing States' and other stakeholders' attention to the issue. As is demonstrated in various reports and reiterated in the Sendai Framework, one of the main consequences of disasters is displacement, which in recent years has increased and is expected to increase further in the future.

The definition of "persons concerned" could also be influenced by the definition of "disaster". Understanding a disaster as a consequence of a hazard would allow including a broader range of affected persons, notably those displaced not only by the actual hazard, but also in the aftermath of the hazard owing to the general level of disruption in the functioning of the community; those for whom the disaster cannot be singled out as the only cause of displacement; and the host communities affected by the inflow of displaced persons. Any adopted measures which do not take into account these situations will always be partial and ineffective in providing protection to affected people.

The definition of affected persons adopted in the draft articles does not take fully into account the importance of the prevention phase, specifically for the protection of persons who risk being affected, which is included in the scope of application of the draft articles (as specified in paragraph (4) of the commentary to draft article 1 [1] and reiterated in paragraph (50 of the commentary to draft article 2 [2]). In addition to persons directly affected, it is suggested that the commentary also refer to persons likely to be affected. The problem is how to determine who is likely to be affected. In the context of disaster risk reduction, the determination of who are the persons at risk is based on an evaluation of the persons' exposure and vulnerability. However, in light of the narrow definition of disaster of the draft articles and of the need to ensure legal certainty, the concept of exposure could be translated into a concept that is easier to define by referring, for example, to a geographical element (all those who live in a certain area). Alternatively, the task of defining who the persons at risk are could be left to the national legislator.

With regard to family members, one needs to take into account the specific situation of those who are not directly affected, but have lost a family member. Their plight may be even more dire than that of families affected by the disaster who have survived and are together. It could even be argued that family members who have lost a relative may be more vulnerable, from both a psychological and a material point of view. Therefore, it is suggested that the exclusion of family members who are indirectly affected be retained, except when those family members are somehow directly affected, for instance owing to the loss of one of their relatives, in which case their possibly heightened vulnerability should be acknowledged.

With regard to the exclusion from the scope of application of the draft articles of economic losses suffered by those who are elsewhere, attention is drawn to the justification of the distinction between those who are there when the disaster strikes and those who are elsewhere. Can it really be maintained that those who were not

there when the disaster took place always have less protection needs than those who were there and were, for example, only slightly affected? Such a distinction is even more difficult to justify in light of the broad scope of application of the draft articles, which also includes the recovery and reconstruction phase. Furthermore, it is hard to justify maintaining such a distinction in light of the importance of the impact on persons of economic losses mentioned in paragraph (7) of the commentary to draft article 3 [3]. The impact on persons and not necessarily the physical presence of the person in the affected area should be the guiding criterion.

Paragraph (9) of the commentary recognizes the central role of economic and social rights in the context of disasters and the special characteristics of those rights that imply an obligation of progressive realization. It would be worth recalling that some minimum core obligations (in relation to the provision of essential foodstuffs, essential health care, basic shelter and housing and education for children) persist even in the context of a disaster. In addition, the needs of the most vulnerable, including migrants and displaced persons but also trapped populations and host communities, have to be specifically taken into account. Furthermore, it would be important to specify that States' margin of appreciation refers to the choice of the measures to be adopted and not to the result to be achieved.

The Commission's choice, in paragraph (10) of the commentary, not to include a list of rights to avoid any *a contrario* interpretation, which would risk excluding other rights that are not mentioned, is well noted. However, for the work of international organizations and their advocacy role, it would be beneficial to have a non-exhaustive list of rights that are relevant in this context. International organizations and other humanitarian actors are constantly confronted with the need to back up their advocacy for the respect of some rights with references to the correspondent obligations set forth in legal instruments.

European Union

The European Union welcomes the reference in draft article 2 [2] to effectively meeting the essential needs of the persons affected by disasters, while being accompanied by a rights-based approach, which is also reflected in draft articles 5 [7] (human dignity) and 6 [8] (human rights). The focus on persons in need is an important point for the European Union. However, it agrees that the two approaches are not exclusive, but complementary.

C. Draft article 3 [3] — Definition of disaster

1. Comments received from Governments

Austria

Despite the explanation in the commentary, the wording of draft article 3 [3] does not indicate whether the qualifier "resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage" relates only to the series of events or also to one "calamitous event". If it is deemed to relate also to the latter, the qualifier "calamitous" is redundant or even confusing since the effect of this event results from the second part of the sentence. However, if the term "calamitous event" stands on its own without further qualifier it is questionable whether the expression "calamitous" is to be understood in the sense of

the second part of the sentence. Likewise, if the qualifier "calamitous" is deemed to relate to both the event and the series of events, it is also redundant in view of the second part of the sentence. The restriction to the event seems also to exclude situations resulting, for instance, from the outbreak of an infectious disease, such as an epidemic or pandemic, which cannot always be traced back to a given event.

Although the definition to a certain extent is based on the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations,[3] it may nevertheless be queried whether the element concerning the disruption of the functioning of society is appropriate. It cannot be excluded that a society may furnish the best proof of its functioning in the situation of a disaster if appropriate relief measures are taken in accordance with well-prepared emergency plans. This would mean that such a situation would not be covered by the definition, because there is no dysfunction of society. It is doubtful whether an earthquake, an avalanche, a flood or a tsunami taken as such necessarily meets the threshold of a "serious disruption of society". If the present definition were taken literally, situations as frequent as those — and expected to fall within the envisaged ambit — would not always be classified as disasters for the purposes of the draft articles.

It would therefore be worthwhile to review the definition of disasters so as to include all disasters, even if they do not seriously disrupt the society of an entire State.

Cuba

The term "disaster" should be defined in accordance with the glossary of the International Strategy for Disaster Reduction,[4] which defines a "disaster" as "a serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources".[5]

Czech Republic

Draft article 3 [3] contains a definition of "disaster" the aim of which is not to be very limiting, on the one hand, but also not far-reaching, on the other hand. In our opinion, the Commission has found the right balance between those two extremes and we support the definition. We understand that there is a need for leaving some space for discretion regarding the possible applicability of the draft articles, however, we would appreciate the Commission further elaborating in the commentary on the definition of "serious disruption of the functioning of society", for instance by way of examples, since such a general definition poses difficulties in determining the threshold which would trigger the application of the present draft articles.

[3] United Nations, *Treaty Series*, vol. 2296, p. 5.

[4] International Strategy for Disaster Reduction, *2009 UNISDR Terminology on Disaster Risk Reduction*, Geneva, May 2009. Available from www.unisdr.org/we/inform/publications/7817.

[5] Ibid., p. 9.

Ecuador

The risk management manual of the Risk Management Secretariat of Ecuador [6] defines a disaster as "a very grave disturbance or emergency whose occurrence or threat is associated with natural or man-made factors. Its management exceeds the capacity of the affected community or society to respond to the situation using its own resources." In the Hyogo Framework for Action[7] it is stated that "the scope of this Framework for Action encompasses disasters caused by hazards of natural origin and related environmental and technological hazards and risks. It thus reflects a holistic and multi-hazard approach to disaster risk management and the relationship between them which can have a significant impact on social, economic, cultural and environmental systems, as stressed in the Yokohama Strategy".[8]

It seems appropriate to add to the definition of disaster the concept of an associated or causative factor, so that the definition takes a holistic approach to risk management.

Germany

The definition of "disaster" should not only focus on fast-onset "events", but also on slow-onset processes such as droughts, which pose a huge threat to high-risk countries. We therefore propose that "prolonged processes" be incorporated into the definition of a disaster in draft article 3 [3].

Netherlands

The Netherlands would prefer to have draft articles 3 [3] and 4 merged into one draft article on the use of terms.

2. Comments received from international organizations and entities

Secretariat of the International Strategy for Disaster Reduction

The proposed definition of disasters of draft article 3 [3] poses a rather high threshold, which leaves out disasters which are indeed considered in paragraph 15 of the Sendai Framework, namely small-scale disasters.

Research and experience indicate that small-scale disasters cause heavy losses, including in economic terms, thus negatively impacting people's resilience, exacerbating existing vulnerabilities and contributing to severe setbacks in human development. Small-scale disasters in their high frequency determine an ongoing erosion of development assets, such as houses, schools, health facilities, roads and local infrastructure. So far they have not received due attention and are often unaccounted for in statistics, thus leaving an incomplete picture concerning impact and consequences; indeed, once the direct losses associated with small-scale

[6] "Manual del Comité de Gestión de Riesgos", June 2014 (available from http://biblioteca.gestionderiesgos.gob.ec/items/show/10), p. 100, item 13.

[7] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, adopted at the World Conference on Disaster Reduction, Kobe, Hyogo, Japan, 18-22 January 2005 (A/CONF.206/6 and Corr.1, chap. I, resolution 2).

[8] Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and the Plan of Action of the World Conference on Natural Disaster Reduction, Yokohama, Japan, 23-27 May 1994 (A/CONF.172/9, chap. I, resolution 1, annex I).

disasters are included in the calculation, the overall direct losses from disasters increase by at least 50 percent of.

It would be critical to ensure that the draft articles also cover small-scale disasters, which by nature do not involve a "widespread loss of life", "great human suffering" or "large-scale material or environmental damage". Against this background, it is suggested that the inclusion of the words "widespread", "great" and "large-scale" be reconsidered, and that the word "economic" be added after "environmental", with commensurate adjustments made in the commentary.

International Organization for Migration

One way of integrating displacement into the draft articles would be to acknowledge the impact that disasters can have on displacement in the definition of "disaster", in draft article 3 [3]. The definition adopted by the Commission acknowledges that large-scale material or environmental damages are normal consequences of disasters (paragraph (7) of the commentary); displacement should be treated in the same way.

The inclusion of a reference to displacement in the definition of disaster would serve two purposes. First, it would provide more visibility to the issue of human mobility, reminding States that in designing their policies, including in the area of disaster risk reduction, they need to acknowledge the risk of displacement and address its negative impacts. Second, by defining what a disaster is, draft article 3 [3] contributes to determining the scope of application of the draft articles. Therefore, a reference to displacement in draft article 3 [3] would imply that, in complying with the other obligations set forth in the draft articles, States should also always take into account the displacement dimension.

In the draft article, disaster is defined as the event and not as its consequences. However, as specified in paragraph (3) of the commentary, "calamitous" is used to establish a threshold, which is further defined by the consequences of such an event, namely "widespread loss of life, great human suffering and distress, or large-scale material or environmental damage", together with a serious disruption in the functioning of the society. This choice creates many levels of analysis that risk creating confusion in the application of the definition, which is key to interpreting the whole text of the draft articles. Is the threshold of calamitous defined per se or by such outcomes? In other words, must the event be both calamitous and cause disastrous consequences or is it only when it causes such consequences that it is considered as calamitous? The distinction is important because an event of a smaller scale could also cause disastrous consequences and one must wonder whether less extreme situations will be included in the scope of application of the draft articles. If the answer is that an event needs to be both calamitous per se and cause the named consequences, which is what is suggested in paragraph (3) of the commentary, then a definition of calamitous is required in the commentary, and it would be important that such a definition also include smaller events.

Furthermore, while the commentaries clarify that the definition is not meant to cover conflicts, it does not seem to be limited to environmental causes (not even in the commentaries). Calamitous events or series of events resulting in widespread loss of life, great human suffering and distress or large-scale material or environmental damage could include all of the following events: natural hazards; slow onset processes of environmental degradation and change; and technological

accidents and epidemics. This may be a deliberate choice by the Commission. However, its clear implications for the scope of the whole text should be carefully considered. Notably, draft article 10 [5 ter] (Cooperation for disaster risk reduction) which, while seemingly referring to disaster risk reduction as articulated in the Hyogo Framework for Action and the Sendai Framework, might be expanded if the definition of "disaster" were broader.

In paragraph (6) of the commentary, it is recognized that severe dislocation can cause "great human suffering and distress" even if there is no loss of life. It is unclear what it is meant by the term "dislocation". Does it include displacement of people? A new paragraph should be inserted, after paragraph (6), referring to displacement as a major consequence of disasters, in order to give to the issue the visibility that is required by the scale of displacement as a consequence of disaster situations.[9]

In paragraph (7) of the commentary, the Commission explains that damage to property and the environment have been included in recognition of the fact that they are standard outcomes of a disaster; so in the same line of reasoning displacement ought to be treated in the same fashion. Therefore, it is suggested that displacement be included in the definition of disaster, together with the reference to human suffering and distress.

Such inclusion would be justified in light of the scale of displacement increasingly caused by disasters and it would give the issue the needed visibility. The purpose would be to ensure that Governments take the risk of displacement of entire communities into account when complying with the various other obligations that are defined in the draft articles, notably in the context of disaster risk reduction and management, but also in addressing the consequence of disasters and ensuring effective protection of affected persons. Displacement puts people in a dire situation through loss of access to livelihoods, services and social capital.

European Union

In light of the terminology that the draft article establishes — such as "calamitous event" and "seriously disrupting the functioning of society" — it appears difficult to determine the threshold needed to trigger the application of the draft articles. This is especially problematic were the draft articles to become a legally binding instrument.

The European Union notes that the draft article reflects to a certain extent the approach of the Tampere Convention by referring to an event or series of events. It is noted, however, that this does not necessarily correspond to other definitions under international law, such as article 3 of the decision of the Council of the European Union on the arrangements for the implementation by the Union of the solidarity clause,[10] and article 4 of the decision on a Union Civil Protection Mechanism,[11] both of which define disaster as "any situation which has or may have a severe impact on people, the environment or property, including cultural heritage".

[9] Internal Displacement Monitoring Center, *Global Estimates 2015 — People Displaced by Disasters*, July 2015.

[10] The Solidarity Clause, article 222 of the Treaty on the Functioning of the European Union (TFEU), O.J. L 192, 1.7.2014, p. 53.

[11] Decision no. 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, L 347/924.

The advantage of that definition is that it focuses immediately on the situation, notwithstanding the cause of it. In addition, the reference to "may have a severe impact" allows for the inclusion of potential threats of a disaster (e.g. spread of Ebola, a storm approaching the land), in order to make such instruments also applicable before a calamitous event actually occurs.

International Committee of the Red Cross

ICRC notes with concern that the definition of disaster for the purposes of the draft articles no longer expressly excludes situations of armed conflict as was the case in earlier versions of the draft articles. The new definition creates overlap and contradictions between rules of international humanitarian law and the draft articles, resulting in confusion and potential conflicts of norms (should the draft articles be converted into an internationally binding instrument).

International Federation of Red Cross and Red Crescent Societies

IFRC suggests that the commentary to draft article 3 [3] mention that the definition of disaster could equally apply to sudden-onset events (such as an earthquake or tsunami) and to slow-onset events (such as drought or gradual flooding). In addition, paragraph (6) of the commentary could usefully point out that "great human suffering and distress" might also be occasioned by non-fatal injuries, disease or other health problems caused by a disaster (and not only by displacement).

D. Draft article 4 — Use of terms

1. Comments received from Governments

Austria

Austria doubts that the definitions of "assisting State" and "other assisting actor" (in subparagraphs (a) and (b)) need the qualifier "at its request or with its consent". Such qualifier seems unnecessary since those particular conditions are the result of the substantive provisions of the draft articles and need not be included in the definitions. Likewise the definitions contained in the Tampere Convention do not include such qualification.

Furthermore, the commentary on subparagraph (e), on the definition of relief personnel, has to be reconciled with State practice since military personnel remain under the full command of the assisting State irrespective of the operational control of the affected State. Accordingly, such relief operations remain attributable to the assisting State.

Cuba

It is proposed that subparagraph (d) be amended to read: "'External assistance' means relief personnel, equipment, goods and services provided to an affected State by assisting States or other assisting actors for disaster relief assistance or disaster risk reduction, at the request or with the consent of the affected State or as previously agreed through cooperation and/or collaboration." It is also proposed that the draft article include the term "disaster risk reduction", which is mentioned in the draft articles and is also included in the glossary of the International Strategy for

Disaster Reduction. Draft article 4 would therefore include a new subparagraph (g): "'disaster risk reduction' means the concept and practice of reducing disaster risk through systematic efforts to analyse and manage the causal factors of disasters, including through reduced exposure to hazards, lessened vulnerability of people and property, wise management of land and the environment, and improved preparedness for adverse events".

Czech Republic

In the commentary to draft article 4, subparagraph (a), the Commission admits that there are situations, although rare, when two States might be regarded as "affected States". Despite the fact that these situations might be exceptional, we find it convenient to have a set of certain indications that may be of use in this respect. Hence, we suggest that the Commission consider putting forward criteria, at least in the commentary, which might be applicable in such situations.

The Czech Republic acknowledges that both civilian and military personnel, as defined in draft article 4, subparagraph (e), may be deployed in emergency situations, including disasters. We would like to draw the attention of the Commission to the Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief (hereinafter "Oslo Guidelines")[12] and the Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies (hereinafter "MCDA Guidelines"),[13] both of which stress the primacy of the use of civilian personnel and limit the use of military personnel to situations where there is no comparable civilian personnel available. We propose that the Commission address this matter in the text of the commentary.

Ecuador

It is recommended that the provision on use of terms be expanded through the inclusion of the following definition of "transit countries":

> "If humanitarian assistance must pass through a country which is not the final beneficiary and such assistance is in transit, the following factors shall be taken into account:
>
> (a) The donor country shall send the necessary documentation for 'goods in transit' to the country that is not the final beneficiary;
>
> (b) The donor country shall coordinate with the transit country regarding facilities for the management of the humanitarian assistance, for example temporary warehouses, security or the facilitation of formalities;
>
> (c) The donor country shall inform the transit country and the country of final destination of the identity of the personnel accompanying the goods for immigration purposes;

[12] Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief — "Oslo Guidelines", Rev.1, 27 November 2006.

[13] Office for the Coordination of Humanitarian Affairs, Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies — "MCDA Guidelines", Rev. 1, January 2006.

(d) The logistical and other costs arising in the passage of humanitarian assistance through the transit country shall be borne by the donor country."[14]

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

[See the comment below on draft article 7 [6].]

Germany

Draft article 4, subparagraph (e), defines "relief personnel" as encompassing both civilian and military personnel and draft article 4, subparagraph (d), defines "external assistance" inter alia by referring to "relief personnel". In consequence, wherever one of those terms is applied, the recommendation might equally refer to civilian and military aid. However, we would like to draw attention to the fact that the Oslo Guidelines and the MCDA Guidelines specify that international military assets should be used only as a last resort, when civilian alternatives are exhausted.

Germany would therefore propose the following amendment to draft article 4, subparagraph (e): "'relief personnel' means civilian or [in exceptional cases in which civilian assistance cannot sufficiently be provided,] military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance or disaster risk reduction".

Netherlands

The Netherlands concurs with the decision of the Drafting Committee not to include definitions for "relevant non-governmental organization" and "risk of disasters".

The Netherlands also supports the inclusion of the phrase "or otherwise under the jurisdiction or control" in draft article 4, subparagraph (a), which broadens the meaning of the term "affected State". In this regard, the Netherlands concurs with the view expressed by the Drafting Committee that the issue of consent of the affected State in situations where there might be multiple affected States merits further attention.

Finally, in relation to the use of the term "relief personnel" in draft article 4, subparagraph (e), the Netherlands calls for coherence in the terminology used in other draft articles, in particular draft article 17 [14], paragraph 1 (a) ("civilian and military relief personnel") and draft article 18 ("relief personnel").

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs supports the definition of the term "affected State" in draft article 4, subparagraph (a), insofar as it emphasizes the primary role and responsibility of the State in whose territory the disaster occurs to protect persons, property and the environment from the effects of disaster. At the same time, the definition is broad enough to cover the situation where a State exercises de facto control over a territory other than its own, thus

[14] *Guía de operación para asistencia mutua frente a desastres de los países miembros de la Comunidad Andina*, April 2013, p. 29. Available from www.preventionweb.net/files/GUIA%20ANDINA.pdf.

minimizing potential gaps in coverage in practice. In this regard, the Office considers the explanation in the corresponding commentary, as to the relationship between the definition and draft article 12 [9], paragraph 1, to be particularly useful.

The Office for the Coordination of Humanitarian Affairs notes, however, that the definition of "affected State" in draft article 4, subparagraph (a), may be too broad insofar as it could be construed as including a State that has jurisdiction or control over individual persons affected by a disaster outside the State's territory. Under public international law and particularly in human rights law, it is accepted that a State has jurisdiction over its nationals even when they are abroad. The definition in draft article 4, subparagraph (a), appears broad enough to cover States of nationality, since it includes "the State ... under the jurisdiction ... of which persons ... are affected by a disaster". Given that the consent of the affected State is required for external assistance, an overly broad definition of "affected State" would be undesirable. Therefore, it might be useful to clarify in the commentary that the term "affected State" is not intended to include a State that has jurisdiction under international law over individual persons affected by a disaster outside the State's territory.

The Office for the Coordination of Humanitarian Affairs notes that the definition of "external assistance" in draft article 4, subparagraph (d), refers to "relief personnel, equipment and goods, and services". Whereas "relief personnel" and "equipment and goods" are defined in draft article 4, subparagraphs (e) and 4 (f) respectively, no definition of "services" is provided. It might be useful to include a definition of this term.

The Office for the Coordination of Humanitarian Affairs is concerned about the definition of "relief personnel" in draft article 4, subparagraph (e), which is understood to mean both civilian and military personnel but which makes no distinction between those two categories. The Oslo Guidelines specify that international military assets should be used as a last resort, "only where there is no comparable civilian alternative and only the use of military or civil defence assets can meet a critical humanitarian need". The Office would recommend that the definition of "relief personnel" in subparagraph (e) be brought into line with the existing consensus language contained in the Oslo Guidelines. At the very least, the commentary to subparagraph (e) should make it clear that international military assets should only be used as a last resort. Alternatively, or in addition, such a clarification could be placed in the commentaries to draft articles 9 [5 bis] or 15 [13], or in a separate, independent draft article.

Secretariat of the International Strategy for Disaster Reduction

Subparagraphs (d), (e) and (f) include definitions which, while appropriate in the context of disaster relief, and indeed those terms are included in the provisions referring to relief, may not be applicable for the purpose of disaster risk reduction. Therefore, it is suggested that the proposed definitions be retained, while deleting the references to "disaster risk reduction" on the basis of the following considerations.

The concept of external assistance put forward in draft article 4, subparagraph (d), and confirmed in draft articles 13 [10] to 17 [14] and 19 [15], seems to apply to a State affected by a disaster. The inclusion of "disaster risk reduction" implies that the term "affected" includes not only being affected by a disaster but also by a

"risk". As such, it would be in contradiction with subparagraph (a), and it would also widen the concept of "affected" beyond the scope and spirit of the draft articles.

In light of the proposed definition in subparagraph (e), "relief personnel" are concerned with relief operations. As also confirmed by the Sendai Framework, disaster risk management concerns measures that need to be taken to prevent the conditions for a disaster being created and a disaster materializing. Such measures need to be taken by all actors across all sectors during the normal course of affairs and, therefore, not by personnel engaged in relief.

Similarly, whereas the definition "equipment and goods", in subparagraph (f), per se seems appropriate, equipment and goods are referred to in draft articles 9 [5 bis], 17 [14] and 18, which explicitly refer to, and concern, relief.

European Union

In order to adequately take into account the specificities of the European Union in an area in which the Union is among the most important international actors, the European Union would appreciate it if the Commission considered including a reference to "regional integration organizations" in draft article 4, subparagraph (c), dealing with "other assisting actors".

As an alternative, the European Union suggests that the commentary to draft article 4, subparagraph (c), should at least clarify that the term "intergovernmental organization" also includes regional integration organizations like the European Union.

Draft article 4, subparagraph (e), defines "relief personnel" as both "civilian and military personnel". Further references to relief personnel can be found in draft article 4, subparagraph (d), in the context of the definition of "external assistance" which refers to "relief personnel", in draft article 17 [14], paragraph 1 (a) ("civilian and military relief personnel") and draft article 18, which refers to "relief personnel" without distinction. Such lack of coherence should be addressed.

The reference to "civilian or military personnel" in draft article 4, subparagraph (e), is not qualified in any way, which is in contradiction to the Oslo Guidelines and the MCDA Guidelines, which specify that international military assets should be used as a last resort, when civilian alternatives are exhausted.

In the same vein, another soft law instrument at the European Union level, the "European Consensus on Humanitarian Aid", which was adopted by the European Commission, the European Parliament, the Council of the European Union and its Member States,[15] links the use of foreign military assets to the fulfilment of the "last resort" principle as enshrined in the aforementioned guidelines and commits the European Union to promoting a common understanding of those guidelines.[16] It furthermore reaffirms military assets can only be used where there is no comparable civilian alternative and only the use of military assets that are unique in capability and availability can meet a critical humanitarian need. Overall a humanitarian

[15] European Consensus on Humanitarian Aid, Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission, O.J. C25, January 2008, p. 1.

[16] Ibid., para. 57.

operation making use of military assets must retain its civilian nature and character.[17] This limitation does not apply to civil protection measures within the Union.

As a consequence, the European Union suggests that a reference to the Oslo Guidelines and MCDA Guidelines be inserted in the commentary to draft article 4, subparagraph (e).

International Federation of Red Cross and Red Crescent Societies

Consideration should be given to including "financial support" within the definition of "external assistance" in draft article 4, subparagraph (d).

While both humanitarian response and risk reduction activities are very important, and often the same actors may be involved in both kinds of activity at different times, a distinction between humanitarian crises and the preparation phase is important. In humanitarian crises, States should provide special facilities and protections to relief personnel (e.g. expedited visas, special security, etc.) that are not needed in times of calm.

In the draft articles, draft article 4 includes in the definition of "relief personnel" not only those who respond to a disaster but also those sent to promote risk reduction. As a consequence, States would be required to provide them special facilities as set out in draft article 17 [14], and even special security guarantees as set out in draft article 18. These should be reserved to situations of crisis in order to avoid unnecessary burdens on States' normal procedures and ensure their willingness to comply when needs are urgent.

IFRC feels that it would be worthwhile to include "telecommunications equipment" and "medicines" explicitly within the list of goods and equipment provided in draft article 4, subparagraph (f).

E. Draft article 5 [7] — Human dignity

1. Comments received from Governments

Austria

The broad wording imposes the relevant obligation on actors beyond those assisting in the case of a disaster.

Cuba

The following wording is proposed: "In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person, as well as the domestic laws of the affected State and its sovereign decisions with regard to the assistance offered."

[17] Ibid., paras. 61-63.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs supports the inclusion of draft article 5 [7], which underscores the need to respect and protect the inherent dignity of the human person. The provision refers to "States, competent intergovernmental organizations and relevant non-governmental organizations" responding to disasters. As the formulation in draft article 5 [7] omits the term "any other entity of individual" (e.g. ICRC or IFRC, as explained in the commentary, as well as private actors) found in draft article 4, subparagraph (c), it might be useful to refer instead to "States and other assisting actors" as defined in draft article 4, subparagraph (c), to ensure that draft article 5 [7] encompasses all relevant actors providing "external assistance". The commentary notes that draft article 5 [7] has been formulated to maintain consistency with draft article 8 [5]. However, it is not immediately clear why the scope of draft article 5 [7] should be limited to that of draft article 8 [5], since the latter is based on a duty to cooperate under international law.

International Federation of Red Cross and Red Crescent Societies

The emphasis the draft articles place on human dignity in draft article 5 [7], and on humanitarian principles in draft article 6 [8], is a very positive aspect. Establishing a hard-law basis for the respect of humanitarian principles in disasters would be a very valuable addition to the current international normative framework.

F. Draft article 6 [8] — Human rights

1. Comments received from Governments

Australia

Australia welcomes the confirmation that existing human rights conventions continue to apply in disaster situations, as is sought to be captured in draft articles 2 [2], 5 [7] and 6 [8]. Australia notes that such conventions contain derogable and non-derogable rights, absolute rights and an obligation to take steps, including through international assistance and cooperation, to the maximum of a State's available resources to progressively realize economic, social and cultural rights.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

Draft article 6 [8] makes reference to the human rights of persons affected by disasters, which is an essential principle in any humanitarian response. People are at their most vulnerable in times of disasters, so preventing human rights violations and abuses and actively fulfilling human rights obligations are of utmost importance. From the Nordic countries' perspective, however, such reference could be strengthened. While it is neither necessary nor advisable to employ very specific and restrictive language in such a document, some further elaboration of this obligation is nevertheless recommended. It would be beneficial to revise the language in the draft article in order to more clearly reflect the duty of States to ensure compliance with all relevant human rights obligations. The draft article could read as follows: "States must ensure that the rights of affected persons under international human rights law are respected, protected and fulfilled without discrimination."

Qatar

Qatar proposes the following addition to draft article 6 [8]: "Persons affected by disasters are entitled to respect for their human rights, because disasters can occur in conflict situations or in a country that is under occupation. Accordingly, draft article 21 [4] does not apply because of the obligations of the occupying Power, and the characteristics of the locale must be preserved."

2. Comments received from international organizations and entities

Food and Agriculture Organization of the United Nations

Recognition of the human rights of persons affected by disasters is of the utmost importance. While the draft article refers only to the obligation to "respect" their human rights, a number of international instruments recognize that States have a number of additional obligations, such as the obligation to "protect", "promote" and "fulfil (facilitate)" (different instruments use different formulations). But it is clear that States' duties are not restricted to avoiding interference with people's rights (respect); States should adopt a number of measures varying from passive non-interference to active ensuring of the satisfaction of individual needs, all depending on the concrete circumstances.

Moreover, in the context of disaster relief and the enjoyment of the right to food, the recognition of an obligation to "provide" would also be appropriate. The obligation to provide entails that the State, as a last resort, must provide food "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal".[18]

The commentary to the draft article could include some of these important elements and the draft article itself could be modified to avoid giving the impression that State obligations are limited to "respecting" human rights.

International Organization for Migration

In paragraph (2) of the commentary to draft article 6 [8], it is pointed out that the reference to human rights encompasses also rights that are contained in non-binding instruments. As mentioned above in the comments on paragraph (10) of the commentary to draft article 2 [2], an express mention of the most important of these instruments, such as the Guiding Principles on Internal Displacement,[19] as well as the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters,[20] would help in identifying the relevant standards. At the same time, it should also be acknowledged that most if not all of the rights that are stipulated in these instruments are already recognized in international conventions or customary law. The added value of these instruments is to explain how human rights apply in the specific context of disasters. Mentioning these standards in the draft articles would represent an important opportunity to fill

[18] Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11.

[19] E/CN.4/1998/53/Add.2, annex.

[20] Inter-Agency Standing Committee, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*, The Brookings-Bern Project on Internal Displacement, January 2011.

the obligations deriving from human rights instruments with more specific content with regard to their application in disaster situations.

The term "respect" to qualify States' and other actors' obligations to implement rights appears too restrictive to capture the full array of obligations that States and other actors have. In light of the importance of the positive obligations they have in this field, it is recommended, at least, to add a reference to "protection" of rights as well (see, for example and among many others, the European Court of Human Rights' case Budayeva v. Russia, 2008).[21]

Although the Commission decided not to provide a list of rights, there are in fact references to a number of rights spread out across the text of the draft articles and commentaries. For example, paragraph (4) of the commentary to draft article 13 [10], on the duty to seek external assistance, refers to a number of rights that are relevant in the context of disasters, including the right to life, food, health and medical services, the right to water supply, to adequate housing, clothing and sanitation and the right to be free from discrimination. It is also reiterated that States have an obligation to protect the right to life. In addition, paragraph (3) of the commentary to draft article 11 [16], on the duty to reduce the risk of disasters, mentions the right to access risk information.

To streamline the relevant information and increase its accessibility, it is suggested that all these references be put under the draft article on human rights or, at the least, that a cross-reference to the relevant parts of the commentaries to other draft articles be added to the commentary.

Furthermore, in line with the Guiding Principles on Internal Displacement, one could consider adding a reference to the impact of human rights violations, committed through State acts or omissions in the pre- and post- disaster phases, on displacement. In that regard, the Guiding Principles stipulate that: "All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons."[22]

International Federation of Red Cross and Red Crescent Societies

This provision provides no guidance to States or other stakeholders as to how to protect persons in the event of disasters and is therefore not likely to have any impact on their behaviour in operations.

IFRC appreciates that it would be impossible to enunciate every right that could prove relevant in a disaster operation and is also conscious of the concern that specifically mentioning some examples might be misread to imply that rights not enunciated do not apply. However, there are certain rights issues that are of frequent concern in disaster settings and can usefully be underlined in the draft articles. Moreover, the latter concern could easily and completely be met by preceding any list in the text with language such as "including but not limited to" and providing clarification in the commentary.

[21] *Budayeva v. Russia*, European Court of Human Rights, 15339/02 & Ors, 20 March 2008.
[22] E/CN.4/1998/53/Add.2, annex, principle 5.

IFRC recommends the following elements that might specifically be mentioned: the right to receive humanitarian assistance; the rights of particularly vulnerable groups (such as women, children, seniors and disabled persons) to have their special protection and assistance needs taken into account; the right of communities to have a voice in the planning and execution of risk reduction, response and recovery initiatives; and the right of all persons displaced by disasters to non-discriminatory assistance in obtaining durable solutions to their displacement.

G. Draft article 7 [6] — Humanitarian principles

1. Comments received from Governments

Ecuador

The protection principle of avoiding exposure of people affected by disaster to further harm and the principle of humanitarian independence should also be included.

The principle of independence was added to the principles of humanity, neutrality and impartiality in General Assembly resolution 58/114:

> "*Recognizing* that independence, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented, is also an important guiding principle for the provision of humanitarian assistance,"

The protection principle of those involved in humanitarian response avoiding exposure of people to further harm as a result of their actions is the first of the four basic protection principles reflected in the Sphere Handbook.[23] It encompasses the following elements: "The form of humanitarian assistance and the environment in which it is provided do not further expose people to physical hazards, violence or other rights abuse; assistance and protection efforts do not undermine the affected population's capacity for self-protection; humanitarian agencies manage sensitive information in a way that does not jeopardize the security of the informants or those who may be identifiable from the information."

Other sources also point to the importance of the "do no harm" principle, which implies that humanitarian action must avoid worsening disparities and discrimination between affected populations; refrain from creating or worsening damage to the environment; avoid creating or exacerbating conflict and insecurity for the affected populations; and take into account the special needs of the most vulnerable groups.[24]

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

One area of concern for the Nordic countries is the issue of neutrality of humanitarian assistance. While draft article 7 [6] refers to neutrality as a

[23] *Humanitarian Charter and Minimum Standards in Disaster Response* (Geneva, The Sphere Project, 2000, revised in 2011), p. 30.

[24] See, for example, UNICEF, *Core Commitments for Children in Humanitarian Action*, New York, May 2010. Available from www.unicef.org/publications/files/CCC_042010.pdf.

humanitarian principle to be taken into account, it appears that this principle is not consistently respected in some of the other draft articles. More precisely, in draft article 4, subparagraph (e), on the definition of "relief personnel", and in draft article 17 [14], paragraph (1) (a), on the facilitation of external assistance, civilian and military relief personnel are referred to in one and the same context. Maintaining neutrality, impartiality and independence is the best way to protect humanitarian space and ensure access to aid for beneficiaries and the safety and security of humanitarian personnel. Therefore, it is pivotal that the relevant draft articles more clearly distinguish between military personnel and humanitarian response and emphasize the fundamentally civilian character of humanitarian assistance. It is key to reaffirm in the draft articles that, where military capability and assets are used as a last resort to support the implementation of humanitarian assistance, the evaluation of the need to use them is to be undertaken with the consent of the affected State and in conformity with international law, including international humanitarian law, as well as humanitarian principles. In this regard, the Nordic countries refer particularly to the guidance given by the Oslo Guidelines.

The protection of vulnerable groups in disasters is another area to be highlighted. The Nordic countries are pleased that the Commission has made explicit reference to the needs of the particularly vulnerable as an important humanitarian principle. Vulnerable individuals and groups are commonly those whose humanitarian situation may become most affected in the event of disasters and who in those circumstances deserve special attention. For this reason, some elaboration could add practical value to the draft article, which in its current form is not very specific or explicit. The draft article could draw from the definitions used in, for example, General Assembly resolution 69/135, which refers to the need to take into account in all humanitarian response "the specific humanitarian needs and vulnerabilities of all components of the affected population, in particular girls, boys, women, older persons and persons with disabilities".

Another key aspect of humanitarian assistance is the importance of the "do no harm" principle. In the context of humanitarian response, assisting actors should avoid exposing people to further harm as a result of their action, ensure access to impartial assistance, protect persons from physical and psychological harm arising from violence and coercion, and assist persons in claiming their rights and accessing necessary remedies. An explicit reference to this essential principle appears to be missing from the current draft articles, and therefore the Nordic countries would suggest including the "do no harm" principle in draft article 7 [6].

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs welcomes draft article 7 [6]. Indeed, humanitarian principles underpin humanitarian action. In addition, the Office would support the inclusion of a reference to the obligation for humanitarian organizations to respect the principle of independence, in accordance with General Assembly resolution 58/114: "Recognizing that independence, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented, is also an important guiding principle for the provision of humanitarian assistance".

One essential element in considering the needs of the particularly vulnerable is community participation. This element is not explicit in the draft articles or commentaries. Affected communities, including vulnerable groups, should be consulted in the design, implementation, monitoring and evaluation and assistance provided in the event of a disaster. The Office for the Coordination of Humanitarian Affairs would support the inclusion in the commentary of a reference to possible ways of including and ensuring community participation.

International Organization for Migration

Although draft article 7 [6] refers to the response to a disaster, in light of the broad scope of application of the draft articles specified in paragraph (4) of the commentary to draft article 1 [1] ("event of disaster" as including the post-disaster response and recovery, including reconstruction) and in light of paragraph (5) of the commentary to draft article 2 [2], the phrase "response to disasters" needs to include pre-disaster risk reduction, where relevant. This should be recalled in the text of the commentary. The principle of non-discrimination, for example, is particularly relevant in the context of the prevention of disasters. In addition, specific attention to vulnerable groups, in terms of ensuring accessibility of information, participation in the decision-making process and preparedness to respond to their specific needs when the disaster strikes, should be a key consideration in the prevention of disasters or their consequences.

The reference to nationality among the grounds for non-discrimination in paragraph (6) is particularly welcome in light of the risk of stigmatization and exclusion of non-nationals in disaster response situations. In this respect, it is suggested that a reference to article 7 of the International Convention on the Rights of All Migrant Workers and of the Members of Their Families[25] be added in a footnote, because the two covenants on international human rights[26] only refer to the broader and less well-defined concept of "national origin" and not to "nationality" as a ground for discrimination. The Commission could also consider adding a reference to legal or social status as grounds for discrimination, in line with the list of grounds provided in principle 4.1 of the Guiding Principles on Internal Displacement.

Paragraph (7) of the commentary specifies that the phrasing "particularly vulnerable" is drawn from the IFRC Guidelines, which refer to the special needs of "women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses". The express citation of the list contained in the IFRC Guidelines is welcome because it facilitates the identification of the categories of persons that should be considered vulnerable in the context of disasters. However, it would be important to single out also the plight of non-nationals in disaster situations. Migrants are often among the worst affected by disasters owing to various factors, including their lack of nationality of the country in which they find themselves, limited language proficiency, limited knowledge of local environmental conditions, including natural hazards, legal frameworks and institutions, limited

[25] United Nations, *Treaty Series*, vol. 2220, p. 3.

[26] International Covenant on Economic, Social and Cultural Rights, 1966, United Nations, *Treaty Series*, vol. 993, p. 3; and International Covenant on Civil and Political Rights, 1966, United Nations, *Treaty Series*, vol. 999, p. 171.

social networks, lack of trust in authorities, restrictions on mobility and discrimination.[27] They often face difficulties in accessing information, resources and opportunities, which reduce their ability to prevent, mitigate, prepare for, cope with and recover from natural disasters. There is an increasing recognition of the specific vulnerability of non-nationals in disaster situations.

European Union

The Commission might wish to consider the scope of the draft article, by extending its scope also to the prevention of disasters to ensure consistency with draft articles 10 [5 ter] and 11 [16], which include disaster risk reduction in the overall scope of the set of draft articles. The application of the humanitarian principles in the prevention phase could be of importance, notably with respect to pre-emptive early response (e.g. drought) or longer-term risk reduction, which should not be assessed as a political priority, but needs-based.

The Commission could consider whether it would be appropriate to insert a reference to the principle of independence.

International Federation of Red Cross and Red Crescent Societies

Draft article 7 [6] refers to the principles of "impartiality" and "non-discrimination" as if they were separate concepts. This might lead to confusion as to the meaning of "impartiality", which is fundamentally based on non-discrimination. As the humanitarian principles form part of the fundamental principles of the International Red Cross and Red Crescent Movement, we have a strong interest in guarding against this kind of confusion. Consequently, it is suggested that if the aim is to place additional emphasis on particular elements of the existing principles, that could be done without creating confusion or undermining the principle by adding the phrase "and in particular" after the word "impartiality".

H. Draft article 8 [5] — Duty to cooperate

1. Comments received from Governments

Austria

Austria emphasizes that draft article 8 [5] must not be interpreted as establishing a duty to cooperate with the affected State in disaster relief matters, including a duty of States to provide assistance when requested by the affected State. Austria takes the view that such a duty does not exist and should not be established. It would contradict the basic principle in the field of international disaster relief, namely the principle of voluntariness.

Switzerland

[See the comment below on draft article 21 [4].]

[27] Lorenzo Guadagno, *Reducing Migrants' Vulnerability to Natural Disasters Through Disaster Risk Reduction Measures*, IOM, MICIC Initiative, Issue in Brief, October 2015.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs welcomes the emphasis in draft article 8 [5] on cooperation between a range of different "assisting actors". As mentioned in relation to draft article 5 [7], it would be useful to refer also to "any other entity of individual", as we understand that private actors also have an important role to play. Indeed, this recognizes that effective disaster response requires cooperation not only among States, but also with intergovernmental and non-governmental organizations as well as other individuals and entities.

Also in relation to draft article 8 [5], the Office for the Coordination of Humanitarian Affairs has a special mandate to assist in the coordination of international assistance on the basis of General Assembly resolution 46/182, which contained provisions to strengthen the United Nations response to both complex emergencies and natural disasters and created the high-level position of Emergency Relief Coordinator as the single United Nations focal point for complex emergencies as well as for natural disasters. The resolution provides that, if there is a need for externally coordinated emergency assistance, the Government of the affected State may inform the Emergency Relief Coordinator and the United Nations representative in the country. The Office for the Coordination of Humanitarian Affairs would support the inclusion in draft article 8 [5] of an explicit reference to the responsibility of the Emergency Relief Coordinator in accordance with resolution 46/182. This could be phrased as follows: "States shall, as appropriate, cooperate among themselves, and with the United Nations, in particular the Emergency Relief Coordinator, and other competent intergovernmental organizations...". In addition, the Office would support the inclusion in the commentary to draft article 8 [5] of a more detailed explanation of the role of the Emergency Relief Coordinator. For example, the Emergency Relief Coordinator processes requests from affected Member States for emergency assistance requiring a coordinated response, serves as a central focal point concerning United Nations emergency relief operations and provides consolidated information, including early warning on emergencies.

In connection with draft article 8 [5] and/or draft article 9 [5 bis], the Office for the Coordination of Humanitarian Affairs would suggest considering the insertion in the commentary of a "duty to inform" or a "duty to notify", analogous to the duty described in the Commission's articles on prevention of transboundary harm from hazardous activities, of 2001.[28] For instance, those articles state in draft article 17 that "the State of origin shall, without delay and by the most expeditious means at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present draft articles and provide it with all relevant and available information". Such a reference could capture a duty to inform/notify those actors that have a mandated role to gather information, provide early warning and coordinate assistance provided by the international community.

[28] *Yearbook ... 2001, vol. II (Part Two)*, para. 97. See General Assembly resolution 62/68 of 6 December 2007, annex.

Food and Agriculture Organization of the United Nations

As indicated in the commentary, the duty to cooperate is well established as a principle of international law that takes on special significance with regard to international human rights law.

The early warning experience of FAO has shown that the absence of "early listening" and "early response" may lead to unnecessary suffering. While it is acknowledged that the obligation to cooperate does not amount to a general duty to provide assistance, it could be construed as an obligation to consider early warning reports and requests for assistance, without there being a duty to accede to such requests.

The commentary to this draft article could go into more detail in this important matter.

World Bank

Concerning draft article 8 [5], the World Bank would like to know under which legal/regulatory framework the cooperation would be organized. It is also important to establish when and how the rules and logistics for coordination will be decided, and whether there is a default leadership role of one particular organization, or the latter would be decided ad hoc. These issues may significantly affect the speed of constituting and operationalizing cooperation. If cooperation is made a duty, there needs to be a clear set of rules and guidance to ensure that this duty becomes a facilitating and not a debilitating factor.

Association of Caribbean States

The draft article should refer to whatever legal instruments the affected State has to effect cooperation and not leave it merely to the remit of the instruments of international law, save and except where the country is signatory to and is bound by the same.

European Union

In view of the important role of the European Union in the field of civil protection and humanitarian aid, the fact that draft articles 4 and 8 [5] do not refer only to States in relation to the provision of external assistance, but encompass a broader notion of "assisting actors", is welcomed. It is also recognized in draft article 8 [5] that a key feature of activity in the field of disaster relief assistance is international cooperation not only among States, but also with competent intergovernmental and non-governmental organizations.

Against this background, a further reference to "regional integration organizations" should be included, which would take into account the special characteristics of the European Union. The term "regional integration organization" is accepted at United Nations level and has been included in important international legal instruments, including, for example, the Convention on the Rights of Persons with Disabilities, of 2006.[29]

[29] United Nations, *Treaty Series*, vol. 2515, p. 3, art. 44 (1).

Draft article 8 [5] acknowledges the importance of international cooperation to international disaster relief and assistance activities. The European Union would like to point out that this expression of good practice should extend to cover cooperation with respect to, inter alia, needs assessments, situation overview and delivery of assistance.

The way the draft article is structured at the moment could give the impression that the cooperation was confined to cooperation between States or between States and other international actors and would not comprise cooperation between those other international actors themselves.

The European Union suggests including precise language in the commentary to draft article 8 [5] to clarify that the duty to cooperate also extends to the cooperation between other assisting actors, including IFRC and ICRC.

International Federation of Red Cross and Red Crescent Societies

A second important gap relates to national Red Cross and Red Crescent societies. While IFRC is appreciative that it has been mentioned, it feels that there is an even stronger normative and practical basis to include national societies in this approach.

To address this issue without introducing additional complexity in the draft articles, IFRC recommends replacing the reference to "the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross" with "the components of the International Red Cross and Red Crescent Movement".

I. Draft article 9 [5 bis] — Forms of cooperation

1. Comments received from Governments

Austria

Austria is not convinced of the need to retain this draft article. As the commentary itself states, this draft article does not contain any normative substance, but only an enumeration of possible forms of cooperation. Although we appreciate the presentation of the various measures taken by States, such an inventory would better remain in the commentary and need not be reflected in a normative provision. The forms of cooperation can hardly be defined in a general way, as they would depend on the particular type of disaster and the specific circumstances of the situation.

Cuba

The following wording is proposed: "For the purposes of the present draft articles, cooperation includes international assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources."

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

Draft article 9 defines "cooperation" as including, inter alia, "making available relief personnel, equipment and goods, and scientific, medical and technical resources". While this list is not exhaustive, it might be useful to include "services", given that this term is included in the definition of "external assistance" in draft article 4, subparagraph (d).

International Organization for Migration

Paragraph (4) of the commentary to draft article 9 [5] explains that, although the draft article highlights specific forms of cooperation, the list is not exhaustive. It is suggested that a reference be added, in the draft article or in the commentary, to cooperation with the countries of origin of non-nationals who are present on the territory, in the form of bilateral coordination aimed to ensure access to nationals during the crisis, evacuation procedures, documentation facilitation, etc. This would be in line with the general purpose of the draft articles recalled in paragraph (3) of the commentary to the draft article, namely to "facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights". The paragraph also recalls that the ultimate goal of the duty to cooperate, and therefore of any of the forms of cooperation referred to in the draft article, is the protection of persons affected by disasters. Cooperation with the countries of origin of the nationals who are present in the area hit by the disaster is also essential to ensure that States of origin can alleviate the burden of the affected States in taking care of their nationals.

Alternatively the issue of emergency consular assistance could be dealt with under draft article 15 [13] on conditions on the provision of external assistance.

International Federation of Red Cross and Red Crescent Societies

Under draft articles 9 [5 bis] and 10 [5 ter], cooperation appears to extend to relief and risk reduction, but not clearly to recovery. IFRC feels that recovery should also be included. Moreover, while non-exclusive, the enumeration of forms of cooperation contained in draft article 9 [5 bis] misses some important aspects, including financial support, training, information-sharing and joint simulation exercises and planning.

J. Draft article 10 [5 ter] — Cooperation for disaster risk reduction

1. Comments received from Governments

Austria

Draft article 10 [5 ter] refers to the duty to cooperate with a view to reducing the risk of disasters. Given the broad definition of disasters, the provision would oblige States to cooperate in reducing the risk of terrorist acts or civil strife below the level of a non-international armed conflict. Austria is of the opinion that the cooperation in these areas is, to a large extent, already covered by other regimes.

Netherlands

The Netherlands favours a clear focus of the draft articles on the phase of the actual disaster, with reference to the title of the study.

Qatar

Qatar proposes the following addition to draft article 6 [8]: "Cooperation shall extend to the taking of measures intended to reduce the risk of disasters *and mitigate the consequences thereof*."

2. Comments received from international organizations and entities

Secretariat of the International Strategy for Disaster Reduction

Draft article 10 [5 ter] is very clear and its wording helps create a link with the measures envisaged not only in draft article 11 [16], but also in the Sendai Framework, especially in the parts concerning cooperation at "global and regional levels" of the four priority areas and section VI on international cooperation and global partnership.

In light of the above, it may be helpful to include specific references to the Sendai Framework in paragraph (2) of the commentary, at the very end: "... risk, as well as the Sendai Framework's parts concerning cooperation at 'global and regional levels' of the four priority areas and section VI on international cooperation and global partnership".

Finally, should the draft article be incorporated in draft article 8 [5], it is suggested that it be done in the form of an independent paragraph and that its current formulation be preserved.

WFP

WFP considers that the inclusion of universal international obligations in draft articles 10 [5 ter] and 11 [16] on the prevention of disasters, including disaster risk reduction, may facilitate the work of WFP insofar as it would prompt States to adopt domestic disaster prevention regulations, hence increasing the likelihood that robust systems will be already in place when disaster strikes. This, in turn, will strengthen the ability of assisting actors to respond effectively at the early onset of emergencies.

World Bank

[See the comment above on draft article 8 [5].]

Since draft article 10 [5 ter] refers to disaster prevention and post-disaster risk reduction (beyond immediate relief and recovery), it is unclear whether this would still be planned and financed under disaster relief instruments, and over which time horizon this would extend.

European Union

The European Union suggests that the Commission consider reflecting in draft article 10 [5 ter] (and also 11 [16]) the good practice recommended in the Sendai Framework.

International Federation of Red Cross and Red Crescent Societies

[See the comment above on draft article 9 [5 bis].]

K. Draft article 11 [16] — Duty to reduce the risk of disasters

1. Comments received from Governments

Australia

Australia submits that it would be of value to further consider the capacity of all States to fulfil the duties embodied, for example, in draft articles 11 [16], paragraph 1, 17 [14] and 18.

Cuba

It is proposed that paragraph 2 be amended to specify the different phases of "early warning". In that regard, the following wording is proposed: "Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, the preparation of the population at risk and the installation and operation of early warning systems, which include the following phases: (a) monitoring and alert; (b) risk assessment and decision-making; (c) warning (communication and dissemination); and (d) protection of persons and property at risk."

Ecuador

The Guayaquil Communiqué of the Fourth Session of the Regional Platform for Disaster Risk Reduction in the Americas[30] should be included in paragraph (5) of the commentary to draft article 11 [16].

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

The Nordic countries would like to emphasize the importance of the well-established principle of international law, due diligence, as partly reflected in the duty of States to take preventive measures to reduce the risk of disasters, which is set forth in draft article 11 [16]. The key in disaster risk prevention is that domestic laws, regulations and public policies define roles and responsibilities and guide the public and private sectors to address disaster risk in publicly owned, managed or regulated services and infrastructures. They should also enhance transparency and public awareness of legal and administrative measures for disaster risk reduction to be undertaken by all relevant institutions from national to local and community level. Disaster risk reduction should be a priority at the community level. While the commentary to draft article 11 [16] rightly describes the nature of preventive obligations, it would be beneficial to elaborate the aforesaid element of risk prevention further.

Moreover, the Nordic countries note that it is necessary to set a duty for States not only to take relevant domestic measures, but also to engage in international cooperation, as is mentioned in draft article 10 [5 ter]. In this respect, further reference could possibly be made in the commentary to the principles introduced in

[30] Available from www.preventionweb.net/english/professional/policies/v.php?id=37662.

the Sendai Framework, including its paragraphs 8, 14, and 44, on the various types and modalities of cooperation.

Germany

The definition of disaster risk reduction should adhere to the international framework, reflected in the Sendai Framework, which clearly points to early warning systems and risk transfer mechanisms as part of a comprehensive understanding of disaster risk reduction. Draft article 11 [16], paragraph 2, should be amended as follows: "[...] 2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems, the installation and maintenance of appropriate infrastructure protection measures, the installation and maintenance of appropriate response surge capacity (personnel and material), and the installation of appropriate financial disaster risk transfer mechanisms."

2. Comments received from international organizations and entities

Secretariat of the International Strategy for Disaster Reduction

Draft article 11 [16] is very welcome as it represents a critical advancement for disaster risk reduction and accountability in disaster risk management.

The Sendai Framework recognizes, as a guiding principle, that "each State has the primary responsibility to prevent and reduce disaster risk" (para. 19 (a)); this is echoed in the goal of "prevent[ing] new and reduce existing disaster risk" (para. 17). Moreover, the expected outcomes include "the substantial reduction of disaster risk" (para. 16).

At the same time, in light of the Sendai Framework and the recognition in the commentary to the draft article that the emphasis and focus is on reducing disaster risk and not preventing disasters, some amendments may be considered in the text of paragraph 1. In particular, while the title of the draft article and paragraph 1 refer to disaster risk, the closing reference to "prevent, mitigate and prepare for disaster" still places emphasis on disasters.

The Sendai Framework goes beyond the focus on "disaster" and focuses on "risk", and not only existing risk, but also future risk created through actions and investments which increase exposure, vulnerability and hazardous conditions.

The following possible alternative for paragraph 1 is suggested: "Each State shall reduce the risk of disasters by taking the necessary and appropriate measures, including through legislation and regulations, to prevent [the creation of new risk and reduce existing risk, mitigate, and prepare for disasters]".

The commentary to the draft article is very strong and provides important guidance — including on due diligence, the obligation to put legal frameworks into place — which is also confirmed by the Sendai Framework and the approach to disaster risk management enshrined therein.

At the same time, in light of the rationale for the proposed amendments to paragraph 1 of draft article 11 [16], it may be necessary to adjust the commentary in paragraphs (11), (15) and (16). In particular, in paragraphs (11) and (15), the phrase "to prevent, mitigate and prepare for disasters" should be replaced with "to prevent

the creation of new risk and reduce existing risk" and, as a consequence, paragraph (16) would be deleted.

Finally, the formulation of paragraph 2 is very clear and consistent with the Sendai Framework. It is suggested that the phrase "in the implementation of the Sendai Framework" be inserted in paragraph (17) of the commentary after the word "future".

Food and Agriculture Organization of the United Nations

The effect of a disaster depends on both the magnitude of the disaster and the existing vulnerabilities of persons affected. Resilience of local populations is therefore very important and should be worked on in both the pre- and post-disaster phases.

Enhancing resilience needs political will, investment, coordination, technical expertise capacities, innovation and shared responsibility for disaster risk reduction and crisis management by countries, local authorities, communities, civil society, the private sector and the international community.

In order to contribute to breaking the cycle of crises and humanitarian interventions that occur in many disasters, emergency programmes should aim at increasing resilience, i.e. the ability to prevent disasters and crises, to anticipate, absorb, accommodate or recover from them in a timely, efficient and sustainable manner and to adapt to new livelihood pathways in the face of crises. Responding to the long-standing call for synergy between emergency assistance and long-term development support, resilience-oriented emergency programming promotes people-centred approaches that respect the inherent rights of affected individuals or groups and builds the capacity to realize human rights, including the right to adequate food. Also relevant in this context is social protection work, which helps to build or rebuild livelihoods by providing basic necessities or minimum services to vulnerable people and contributes to long-term development by improving levels of health, education, nutrition and social integration.

The importance of human rights in resilience-building programmes lies in improving absorptive, adaptive and transformative capacities based on the recognition of the interests and rights of affected populations and the roles, duties and responsibilities of various actors in pre- and post-emergency situations.

The commentary to this draft article could benefit from an analysis of the relationship between reducing the risk of disasters and the concept of resilience.

World Bank

Draft article 11 [16], paragraph 1, should specify the standards and good practice references for legislation, regulations and measures for disaster prevention. Also, for many States this duty could theoretically develop into a multi-billion dollar liability; some countries have annually recurrent damage rates in the range of a percentage of their gross domestic product. Countries will need smart guidance to identify low-hanging fruit and develop intelligent prevention programmes, often focusing on low-cost regulatory efforts such as land management, including spatial planning. The spatial planning component is probably worth mentioning specifically in draft article 11 [16], paragraph 2.

International Organization for Migration

It would be important to add an express reference to the Sendai Framework as the new standard for disaster risk reduction efforts, and specifically to the key priorities that are identified in the Framework.

The examples of disaster risk reduction measures mentioned in paragraph 2 may be too narrow. It should be noted that neither the Hyogo Framework for Action nor the Sendai Framework in fact link disaster risk reduction with humanitarian interventions per se. Reducing risk is a process mainly dependent on non-humanitarian actors, in particular when one looks at its core elements, which are rooted in sustainable development and long-term local-level empowerment practices. This is the case both at national and international levels: of the whole spectrum of disaster risk reduction activities, emergency responders and humanitarian actors tend to engage only with the reduction of the risk of hazard as opposed to the consequences of the hazard. It would be important that this draft article acknowledge more strongly that key elements of disaster risk reduction are the interventions aimed at reducing vulnerability and building resilience.

Association of Caribbean States

The use of the word "dissemination" should be defined specifically as an activity under disaster risk reduction measures. This may add a burden to the affected State if the State is expected to develop a platform of collected data, and also introduces issues of accessibility, maintenance, sharing protocols, etc.

European Union

[See the comment above on draft article 10 [5 ter].]

International Federation of Red Cross and Red Crescent Societies

An important aspect of the draft articles is the assertion in draft article 11 [16] that States have a duty to take necessary and appropriate steps to reduce disaster risks. While the recently adopted Sendai Framework has set a clear global agenda, affirming this duty in a binding instrument would provide a helpful tool for champions of disaster risk reduction within Governments to make the case for greater attention to this critical activity.

While IFRC applauds the assertion of an obligation to reduce risks in draft article 11 [16], paragraph (1), it feels that the listing of "risk reduction measures" in paragraph (2) should not be limited to assessing risk but also extend to assessing and reducing vulnerability and increasing the resilience of communities faced with natural hazards.

L. Draft article 12 [9] — Role of the affected State

1. Comments received from Governments

Australia

Australia is mindful of creating duties that States may lack the capacity to fully implement. While Australia welcomes the reflection in draft article 12 [9] of the primary role of the affected State in preventing and responding to disasters,

Australia would approach with care the assertion, in paragraph 1, of an unqualified duty on the part of the affected State to ensure the protection of persons and provision of disaster relief and assistance on its territory.

Austria

[See the comment above on draft article 4.]

Cuba

Concerning draft article 12 [9] on the role of the affected State, the following wording is proposed for paragraph 1: "The affected State, by virtue of its sovereignty and in accordance with its national legislation, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory."

Germany

The approach to the concept of sovereignty enshrined in draft articles 12 [9] to 15 [13] is highly pertinent. In particular, we share the perception that sovereignty entails the duty of the affected State to ensure within its jurisdiction the protection of persons and the provision of disaster relief.

Switzerland

We note that certain draft articles, such as draft article 12 [9], paragraph 2, and draft article 16 [12], are more concerned with sovereignty and more intrusive towards humanitarian action than international humanitarian law.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs supports the approach to the concept of sovereignty adopted in draft articles 12 [9] to 15 [13], in particular the notion that sovereignty entails the duty of the affected State to ensure within its territory the protection of persons and the provision of disaster relief.

World Bank

The combination of draft articles 12 [9], 13 [10] and 14 [11] seems to be confusing. The affected State has territorial sovereignty (draft article 12 [9]), but also the duty to seek assistance under specific conditions set in draft article 13 [10], and it has the right of consent (draft article 14 [11], paragraph 1), but it cannot withhold consent arbitrarily (draft article 14 [11], paragraph 2). Thus it is crucial to determine what in concrete terms happens if a State cannot cope with a disaster, but refuses international help. And if such a scenario were to occur, what leverage would the United Nations have? It is also vital to consider whether this legal framework would speed up disaster relief, or would introduce additional formal due diligence requirements and clearances that could create delays. In our experience, if the legal and regulatory situation is not crystal clear at the onset of a disaster, each decision point will inevitably cause delays that in the face of extreme urgency are bound to be significantly negative in their impacts.

European Union

Draft articles 12 [9] to 14 [11] concern the duties of the affected State and are accordingly central to the whole set of draft articles. Overall, the European Union congratulates the Commission and the Special Rapporteur for having succeeded in striking a balance between the need to safeguard the national sovereignty of the affected State, on the one hand, and the duty to cooperate, on the other, as provided for by the interplay of draft articles 13 [10], 14 [11] and 16 [12].

International Committee of the Red Cross

As they stand, the draft articles contain provisions that appear to be at odds with international humanitarian law. For instance draft article 12 [9], paragraph (2), stipulates that "the affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance", but the commentary fails to define what these terms mean for purposes of the draft articles. In its current form, the draft article is potentially very intrusive for impartial humanitarian organizations such as ICRC. In addition, it could be read in conjunction with draft article 7 [6] on humanitarian principles, which does not refer to the principle of independence. No such requirements of direction, coordination and supervision can be found in the relevant rules of international humanitarian law. International humanitarian law only authorizes the concerned parties to armed conflict and States to verify the humanitarian nature of the assistance through a so-called "right of control". The draft articles do not seem to restrict the "affected State" to such limited right of control and are therefore much more sovereignty-oriented than the corresponding provisions of international humanitarian law governing humanitarian access.

M. Draft article 13 [10] — Duty of the affected State to seek external assistance

1. Comments received from Governments

Austria

Austria recognizes that all States are obliged to provide for an appropriate disaster relief system in order to protect their citizens. Such a relief system should encompass prevention, preparedness and response measures. Nevertheless, Austria is not convinced that the present formulation is striking the right balance between State sovereignty and the protection of individuals. In cases in which the national response capacity is exceeded in the event of a disaster, the State concerned should seek assistance to meet its responsibilities, but has no such duty. This approach would also correspond to guideline 3.2 of the IFRC Guidelines.

In Austria's view the term "as appropriate" would indicate that a State should seek assistance that is commensurate to the actual scope of the disaster. At the same time, this draft provision must not be understood as excluding the right of a State to seek assistance in the case of disaster even if its response capacity is not yet exceeded.

Several further difficulties are connected with the approach pursued in this draft article. States are sometimes reluctant to receive foreign assistance and to admit a lack of response capacity. If a State denies that a disaster exceeds its

response capacity, what would be the consequence? In no case could such a situation entitle another State to act without the consent of the affected State.

Cuba

Concerning draft article 13 [10] on the duty of the affected State to seek external assistance, the following wording is proposed: "To the extent that a disaster exceeds its national response capacity, the affected State has the right to seek bilateral or international assistance from other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate."

Ecuador

The draft articles referring to the duty of the affected State should be supplemented by including the recommendation for launching an international appeal, or something similar, within the request for humanitarian assistance.

The international cooperation modality in cases of emergency is referred to in the "Guide to International Humanitarian Assistance in Emergencies and Disasters"[31] as follows: "Ecuador as an assisting State providing international cooperation in emergencies or disasters: so that this cooperation modality can be implemented, the Ecuadorian Ministry for Foreign Affairs must have received a request for international assistance coming from the Constitutional Government of the affected country, indicating the needs, characteristics and conditions of the appeal ...".

Lastly, it is also recommended that the set of draft articles should include the topic of the protection of displaced persons in situations of disaster, and should determine generally the obligations of the competent international organizations and expand as far as possible the meaning and especially the scope of the concepts of assistance, mitigation, preparedness, prevention and recovery.

The absence of a draft article making reference to displacement of persons affected by disasters should be noted; therefore, inclusion of provisions recognizing the right to protection and security of displaced persons, both internally as well as cross-border, is recommended.

No draft article expressly refers to the obligations of the competent international organizations, IFRC, ICRC and relevant nongovernmental organizations.

Being aware that the concepts of relief, humanitarian assistance, preparedness, response and recovery are evolving and that currently there is no clear consensus among authors and organizations on their scope, we would like to highlight the most recent tendency to consider the connectivity among the various actions that each process brings about. We thus suggest that this connectivity should be reflected in the set of draft articles and that an effort should be made to clarify their significance and scope.

[31] Republic of Ecuador, *Manual para la Gestión de la Asistencia Humanitaria Internacional en Situaciones de Emergencia y Desastre*, February 2011.

Therefore, the Commission ought to consider aligning the draft articles with the terminology adopted by the International Strategy for Disaster Reduction and IFRC in its Guidelines.

Germany

[See the comment above on draft article 12 [9].]

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs would support the insertion in the commentary to draft article 13 [10] of a reference to the role of the Emergency Relief Coordinator and the Resident Coordinator, in accordance with General Assembly resolution 46/182, and an explanation of the key procedures that the affected State should follow when requesting external assistance. For instance, the Office would welcome a reference to paragraph 35 (a) of the annex to resolution 46/182, which refers to the role of the Emergency Relief Coordinator, as supported by the Office for the Coordination of Humanitarian Affairs, in "processing requests from affected Member States for emergency assistance requiring a coordinated response", and to paragraph 39 on the role of the Resident Coordinator in country-level coordination of humanitarian assistance. In addition, humanitarian coordinators are responsible for leading and coordinating humanitarian action of relevant organizations (including United Nations, non-governmental and civil society organizations) in a country with a view to ensuring that it is principled, timely, effective and efficient, and contributes to longer-term recovery.

World Food Programme

WFP welcomes the inclusion of draft article 13 [10] concerning the responsibility of the affected State to seek assistance when its national response capacity is exceeded, which could create an international legal obligation for States.

European Union

With regard to the criterion "exceeds its national response capacity", the European Union proposes that the Commission include a reference to the terminology adopted by the International Strategy for Disaster Reduction with respect to the capacity to cope: "a serious disruption of the functioning of a community or a society involving widespread human, material, economic or environmental losses and impacts, which exceeds the ability of the affected community or society to cope using its own resources".

As a general remark in relation to draft article 13 [10] and draft article 14 [11], paragraph 2, the European Union notes that these draft articles comprise notions — "to the extent that a disaster exceeds its national response capacity" and "consent to external assistance shall not be withheld arbitrarily" — which accord a certain discretional flexibility to the affected State without referring to objective criteria for determining when the respective requirement is fulfilled.

International Federation of Red Cross and Red Crescent Societies

While IFRC agrees with the assertion that States sometimes have a duty to seek external assistance, it does not believe that States necessarily must accept it from anyone who chooses to offer it (in particular from those mentioned in draft article 13 [10]). In particular, it may often be appropriate for States to choose among providers with the capacity and competence to provide assistance of appropriate quality. Draft article 13 [10] attempts to address this through the use of the term "as appropriate", but the commentary could be more explicit in explaining that the duty is to seek help, not to seek it from any one external actor.

N. Draft article 14 [11] — Consent of the affected State to external assistance

1. Comments received from Governments

Australia

The draft articles (quite properly) proceed on the basis that the consent of the affected State remains a condition precedent to the provision of external assistance. However, Australia has reservations about the inclusion in draft article 14 [10], paragraph 2, of a duty of the affected State not to "arbitrarily" withhold its consent. Such a duty does not exist in customary international law. Australia queries the standards against which and by whom any perceived "arbitrariness" would be measured, and also whether it would be beneficial in practice to place on States, which may be reluctant to seek or accept external assistance, a duty to do so. Failure to comply with any such duty would not give rise to any corresponding right of intervention by other States wishing to provide assistance.

Austria

Austria endorses the first principle in draft article 14 [11], which is reflected in many recent international documents dealing with this topic and also in the solidarity clause of article 222 of the Treaty on the Functioning of the European Union.[32] In Austria's view, such consent must be a valid consent in the sense of article 20 of the articles on the responsibility of States for internationally wrongful acts. Although this qualification seems to be self-evident, it would nevertheless be useful to include it in the commentary.

Austria could also concur with the second paragraph, concerning the duty not to deny consent arbitrarily. The term "arbitrarily" gives rise to an obligation to accept assistance, if the response capacity is exceeded and no other serious reasons justify a denial of consent. Even if consent is denied arbitrarily, under existing international law, no other States would be entitled to substitute for the affected State and to act without its consent, irrespective of any international responsibility incurred by the affected State. Austria welcomes the duty of the affected State in paragraph 3 of draft article 14 [11] to publish its decision on any offer of assistance. Such a duty would certainly facilitate the invocation of a responsibility of the affected State in this regard.

[32] European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

Draft article 14 [11] underlines the importance of consent of the affected State to external assistance. The Nordic countries note with satisfaction that draft article 14 [11], paragraph 2, underlines that consent to external assistance shall not be withheld arbitrarily. As it appears, the term "arbitrarily" should be clearly defined in the commentary. It is indeed of utmost importance that the needs-based approach to humanitarian assistance of the affected population is respected and that the affected State does not withhold its consent to external assistance without legitimate grounds.

Germany

[See the comment above on draft article 12 [9].]

We concur that although the consent of the affected State shall not be withheld arbitrarily, consent is nevertheless an indispensable requirement for every provision of external assistance.

Qatar

Qatar proposes the following addition to draft article 14 [11]: "2. Consent to external assistance shall not be withheld arbitrarily *or in a manner that indicates it was so withheld.*"

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

It might be more logical to change the order of draft articles 14 [11] to 17 [14] and first speak of offers of external assistance, then consent, facilitation and conditions (i.e. draft articles 16 [12], 14 [11], 17 [14], and 15 [13]).

The Office for the Coordination of Humanitarian Affairs supports draft article 14 [11], paragraph 2. It notes that, in certain circumstances, an arbitrary withholding of consent may amount to a breach of international human rights law. For example, a State's denial of access to materials that are essential for survival may amount to a violation of the right to life, or it may prevent the satisfaction of the minimum core of relevant economic, cultural and social rights, such as the right to food and water and to health and medical services. Moreover, in the context of armed conflict, such denial may amount to a breach of international humanitarian law.

The Office would suggest that draft article 14 [11], paragraph 2, also include a reference to the withdrawal of consent, such that consent to external assistance shall not be withheld or withdrawn arbitrarily.

The Office would further suggest that draft article 14 [11], paragraph 3, include a requirement as to timeliness, such that the affected State shall, whenever possible, make known its decision regarding the offer within a reasonable time frame. The notion of timeliness is discussed in the commentary, which notes that the failure of an affected State to make known its decision within a reasonable time frame may be deemed arbitrary. The Office is of the view that this element of timeliness should be included in the text of draft article 14 [11], paragraph 3, itself.

World Food Programme

Together with draft article 13 [10] concerning the responsibility of the affected State to seek assistance, WFP welcomes the ongoing debate on whether an implicit request for, or an implicit acceptance of, international assistance by the affected State could be assumed in certain extreme cases and, if so, what conditions would need to be satisfied.

We note that the order and sequence of draft articles 14 [11], 15 [13] and 16 [12] does not reflect the normal chronology of events when a disaster occurs. Specifically, the draft article concerning the right to offer assistance (draft article 16 [12]) is placed after that concerning consent to be provided by the affected State (draft article 14 [11]) and the draft article on conditions for the provision of external assistance (draft article 15 [13]). However, in a disaster scenario offers of assistance would frequently precede the affected State's consent to them. It may be advisable to consider changing the order of those draft articles to align them to the normal sequence of events. The significance of the aforementioned rearrangement goes beyond a mere question of form. The current order could be interpreted as implying that offers of assistance should be adapted to conditions set by the affected State, which could pose operational and other problems, for example, the conditions that an affected State may impose prior to receiving offers of assistance could fail to take into account the existing capabilities of the assisting actors or the level of support that these actors are able to provide. Accordingly, it would be advisable to place draft article 16 [12] before draft article 14 [11].

European Union

[See the comment above on draft article 13 [10].]

More specifically on the notion of "arbitrarily withholding of consent", it seems that a case-by-case approach has to be accepted, although it could be elaborated further in the commentary on what is meant by this term and what kind of motivation should be deemed acceptable, if an affected State refuses assistance.

In this respect, the European Union proposes that the commentary to draft article 14 [11] introduce a link to draft article 15 [13] concerning the formulation of conditions on the provision of external assistance. In fact, the formulation of conditions can contain the justification for refusing assistance or for the withholding of consent. In this respect, it appears to deliver an important element in order to further define when the consent is arbitrarily withheld.

International Federation of Red Cross and Red Crescent Societies

IFRC agrees with the Commission's assertion in draft article 14 [11] that, while States' consent is required prior to the provision of outside assistance, such consent should not be withheld arbitrarily. IFRC considers that this rule would set out a reasonable approach, leaving significant discretion with the sovereign power, but also affirming that this discretion should be not be abused in the face of humanitarian need.

However, given that this draft article has already proven controversial in the Sixth Committee and may not be welcomed by a significant number of States, IFRC fears that its inclusion in the draft articles may jeopardize support for the project overall. Moreover, while there have been occasions on which States have refused all

offers of international aid when it was clearly needed, the problem is relatively rare in disaster settings (as opposed to situations of conflict).

O. Draft article 15 [13] — Conditions on the provision of external assistance

1. Comments received from Governments

Austria

Austria reiterates that the conditions under which assistance may be provided should not be the result of the unilateral decision of the affected State; they should rather be the result of consultations between the affected State and the assisting actors, taking into account the general principles governing assistance and the capacities of the assisting actors.

Cuba

Concerning draft article 15 [13] on conditions on the provision of external assistance, it is proposed to add the following sentence at the end of that paragraph: "The provision of external assistance cannot be dependent on elements that undermine the sovereignty of the affected State."

Czech Republic

We agree that the affected State may wish to place conditions on the provision of external assistance and, according to the current situation, indicate the scope and type of assistance sought. For enabling and speeding up the activities of the relief personnel we suggest that the commentary to draft article 15 also set forth that the affected State may indicate general conditions of such assistance including, inter alia, transport and security conditions, points of contact, etc.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

Draft article 15 [13] complements draft article 14 [11]. The key in draft article 15 [13] is the right to place conditions on assistance. As pointed out in the commentary, it is the recognition of a right of the affected State to deny unwanted or unneeded assistance and determine the appropriateness of assistance. The Nordic countries would suggest elaborating this essential aspect of humanitarian assistance further in the commentary. What should be explicitly mentioned therein is that unsolicited or inappropriate assistance has been a problem in many affected countries, hampering the delivery of assistance that is actually needed and causing delays.

Some rewording would also add more practical value to draft article 15 [13]. Particular attention should be paid to the importance of the needs of individuals affected by disasters, which does not appear to be sufficient in the language used in the draft article. Therefore, it would be preferable to replace the expression "take into account" with a less vague expression, such as "verifiably reflect", to highlight this aspect.

Germany

[See the comment above on draft article 12 [9].]

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

[See the comment above on draft article 14 [11].]

World Food Programme

Regarding the conditions for the provision of assistance that are listed in draft articles 14 [11] and 15 [13], WFP appreciates their objective of achieving the protection of affected persons while respecting the sovereignty of the affected State.

WFP welcomes the debate on ways to make the conditions and limitations of draft article 15 [13] more operationally driven through references in the commentary to soft-law instruments. The reference to documents — such as the Operational Guidelines on the Protection of Persons in Situations of Natural Disasters[20] or the Sphere Handbook[23] — that are widely recognized by humanitarian actors as constituting good practice could mitigate undesirable consequences that might otherwise follow adoption of domestic requirements that ignore these standards.

See the comment above on draft article 14 [11].]

International Organization for Migration

Conditions on the provision of external assistance should take into account the needs of persons affected by a disaster, in line with draft article 2 [2]. According to paragraph (8) of the commentary, this entails that the special needs of vulnerable persons should also be considered. In the list of relevant vulnerable groups, it would be important to add a reference to displaced persons, because of their specific vulnerability in this context, but also to migrants (in the sense of non-nationals) who are particularly reliant on the assistance that can be provided by their country of origin (external assistance) or by international organizations. Migrants may be less protected than the nationals of the country in the context of humanitarian emergencies and have troubles in accessing humanitarian assistance, particularly if they are in an irregular situation.

It would be important for the commentary to the draft article to expressly recognize that conditions imposed on the provision of external assistance should not disproportionally limit the right of foreign States to provide assistance to their nationals caught in the crisis situation. Such right of States is based on article 5 of the Vienna Convention on Consular Relations, of 1963,[33] which recognizes that one of the principal consular functions is "helping and assisting nationals, both individuals and bodies corporate, of the sending State".

Often the most effective solution in a situation in which protection and assistance in situ cannot be guaranteed is return or evacuation of migrants to their countries of origin. Consular authorities can play a key role in assisting their nationals caught in a disaster situation, notably by replacement of lost travel documents or provision of laissez-passer for migrants to be evacuated to their home countries. Evacuation of migrants can also have the positive effect of decreasing the pressure on the affected State by limiting the number of the persons in need of assistance.

[33] United Nations, *Treaty Series*, vol. 596, p. 261.

European Union

The right to condition assistance is not unlimited. It must be exercised in accordance with the draft articles and applicable rules of international and national law. The draft article also indicates that the conditions are to be determined taking into account the identified needs of persons affected by disasters and the quality of assistance, and it requires the affected State, when formulating conditions, to indicate the scope and type of assistance sought.

Draft article 15 [13] assumes a central place in the draft set of articles, both in relation to the draft articles concerning the duties of the affected State and the more operational provisions on the facilitation of assistance. In that sense, draft article 15 [13] ("may place conditions") not only furthers the principles laid down in draft article 12 [9], which acknowledges the primary role of the affected State — by virtue of its sovereignty — in the control, coordination and supervision of disaster relief on its territory, but also recognizes the right of the affected State to deny unwanted or unneeded assistance and to determine what and when assistance is necessary.

There is little guidance for the formulation of conditions. Draft article 15 [13] obliges the affected State, when formulating conditions, "to take into account" the identified needs of the persons affected by disasters and the quality of the assistance. Despite the fact that these two conditions are mentioned — needs and quality — the notion of conditions remains vague. The European Union suggests that the Commission should either consider using a stronger formulation than "taking into account" or adding more explanations in the commentary.

Draft article 15 [13] also requires alignment with the national law of the affected State. In this respect, the European Union suggests that the relationship to draft article 17 [14] on the facilitation of external assistance be further clarified in the commentary. For instance, in emergency situations the affected State may be required to waive provisions of its law, including those relating to privileges and immunities, regulatory barriers, customs requirements or tariffs. Measures of this kind — that is, to facilitate the prompt and efficient provision of assistance — are specifically addressed in draft article 17 [14] on the facilitation of external assistance.

International Committee of the Red Cross

Under draft article 15 [13], "when formulating conditions [on the provision of external assistance], the affected State shall indicate the scope and type of assistance sought". This could result in conferring to the affected State an unfortunate pick-and-choose option in relation to the humanitarian activities to be carried out by humanitarian actors, while international humanitarian law foresees in article 81 of Additional Protocol I to the Geneva Conventions[34] that "Parties to the conflict shall grant to the ICRC all facilities ... so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts ...".

[34] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512.

International Federation of Red Cross and Red Crescent Societies

While the draft articles rightly assert humanitarian principles and human dignity as central, they leave it largely up to affected States to articulate any other "conditions" of assistance in draft article 15 [13]. This again provides little incentive for a harmonized approach as to the quality of relief and also fails to commit providers to minimum standards within the scope of this international instrument. IFRC recommends that the draft article be enhanced with greater detail.

P. Draft article 16 [12] — Offers of external assistance

1. Comments received from Governments

Austria

In Austria's view, a problem might arise from the fact that international organizations, non-governmental organizations and States are treated identically in draft article 16 [12]. Some organizations may not have the relevant competence to offer assistance and this draft provision must not be understood as providing the organization with such a right. It may also be asked whether non-governmental organizations should be directly addressed by such an international instrument. Therefore, this draft provision would need some further clarification.

Cuba

Concerning draft article 16 [12] on offers of external assistance, the following wording is proposed: "In responding to disasters, States, the United Nations and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State. In all cases, the affected State shall be the one that requests external assistance and the offer of such assistance may not be subject to conditions."

Czech Republic

The commentary to the draft article does not deal with possible offers of assistance by individuals, whereas, for instance, the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response[35] and other sets of rules, including the Oslo Guidelines, recognize them as assisting actors.

Switzerland

[See the comment above on draft article 12 [9].]

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

[See the comment above on draft article 14 [11].]

[35] ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005, ASEAN Documents Series 2005, p. 157.

World Food Programme

[See the comment above on draft article 14 [11].]

International Committee of the Red Cross

As an illustration of the contradictions existing between the draft articles and international humanitarian law, it should be noted that draft article 16 [12] confers the "right to offer" assistance to States and intergovernmental organizations, while non-governmental humanitarian agencies only "may offer" their services, which completely changes the perspective of — and in a way denies — the right of initiative to which impartial humanitarian organization such as ICRC are entitled under international humanitarian law and which places these organizations in a privileged position.

International Federation of Red Cross and Red Crescent Societies

Draft article 16 [12] refers to the "right" of States, the United Nations and other competent international organizations to offer assistance. IFRC considers it unnecessary to refer to a "right to offer" as such, as it addresses a problem that in practical terms does not exist. Assistance-related operational problems constitute a more important issue that any international instrument on this matter should address. However, if the Commission is to keep the reference to a "right to offer assistance" by third actors, additional wording qualifying or characterizing the assistance could be included, along the lines of article 3, paragraph 2, of Additional Protocol II to the 1949 Geneva Conventions,[36] which states that assistance shall not be used as a justification for intervening, directly or indirectly, in the internal or external affairs of the affected State.

The second sentence of draft article 16 [12] and the commentary thereto are also problematic. The former states that "relevant non-governmental organizations may also offer assistance to the affected State", and paragraph (5) of the commentary explains that the second sentence intends to recognize "the important role played by those non-governmental organizations which, because of their nature, locations and expertise, are well placed to provide assistance in response to a particular disaster". The commentary continues by making reference to provisions in the 1949 Geneva Conventions and Additional Protocol II dealing with the role of ICRC and national Red Cross and Red Crescent societies. However, this second part of draft article 16 [12] is misleading, as neither ICRC nor the national societies are non-governmental organizations.

Moreover, at the 32nd International Conference of the Red Cross and Red Crescent, in December 2015, the State parties to the Geneva Conventions endorsed the Principles and Rules for Red Cross and Red Crescent Humanitarian Assistance (the latest iteration of a document first adopted by the International Conference in 1969).[37] This document sets out how IFRC and national societies cooperate with each other in international disaster operations. It makes clear that the IFRC and

[36] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, United Nations, *Treaty Series*, vol. 1125, No. 17512.

[37] *Principles and Rules for Red Cross and Red Crescent Humanitarian Assistance*, adopted at the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8-10 December 2015.

foreign national societies make their offers of aid to the national society of the affected State, rather than to the Government, because their support is designed to assist the latter in fulfilling its own mandate under international and national law. Of course, the national society of the affected country is expected to coordinate closely with the relevant authorities to ensure its consent to any aid provided in this connection. A sentence in the commentary could ensure that there is no misapprehension of an intention to impinge on this State-approved specificity of the Red Cross and Red Crescent practice with regard to offers and acceptance.

Q. Draft article 17 [14] — Facilitation of external assistance

1. Comments received from Governments

Australia

[See the comment above on draft article 11 [16].]

Austria

Draft article 17 [14] regarding the facilitation of external assistance requires the affected State to take the necessary legislative measures. However, practice shows that more issues have to be addressed by the legislation than only those mentioned in the draft article, such as confidentiality, liability issues, the reimbursement of costs, privileges and immunities, control and competent authorities. Articles 6 to 10 of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, of 1986,[38] are illustrative in this regard. Similarly, paragraph VII (2) of the resolution of the Institute of International Law on humanitarian assistance[39] refers to the obligation to prepare the required legislation regarding overflight and landing rights, telecommunication facilities and necessary immunities, exemption from any requisition, import, export and transit restrictions as well as customs duties for relief goods and services, and the prompt granting of visas or other authorizations free of charge. In line with these provisions and in order to give clear guidance, Austria suggests that draft article 17 [14] be completed accordingly.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

[See the comment above on draft article 7 [6] and the comment below on draft article 19 [15].]

Netherlands

Given the need for enhanced attention to the protection of relief personnel, the Netherlands agrees with the decision of the Drafting Committee not to merge draft article 18 (Protection of relief personnel, equipment and goods) with draft article 17 [14] (Facilitation of external assistance).

[38] United Nations, *Treaty Series*, vol. 1457, No. 24643.

[39] Resolution on humanitarian assistance adopted by the Institute of International Law at Bruges, Belgium, on 2 September 2003.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

[See the comment above on draft article 14 [11].]

World Bank

The qualifier "within its national law" could be a major stumbling block and cause long delays in relief delivery, until legal issues are sorted out, unless the national law contains specific provisions allowing exceptions in case of emergencies. Here lies an important connector with draft article 11 [16], where provisions for exceptional rules for immigration, work permits, import and duties should be advocated to be integrated into national law.

Association of Caribbean States

The use of the phrase "prompt and effective" could put undue burden on the affected State, which may very well be operating in crisis mode with legal suspension of national legislation (such as in a state of emergency). The phrasing needs to be reconsidered.

If during such time an affected State seeks to "protect" its citizens, the onus should be on providing support as opposed to focusing on facilitation. While the foregoing does not mean that a State should erect additional bureaucracy, care must be taken that it is not implied that this be obligatory.

Paragraph 2 makes an assumption about the capacity of the affected State. It may be onerous to consider that a State operating in crisis should be ensuring the same. In our opinion, the duty of care rests with the responding actors.

International Federation of Red Cross and Red Crescent Societies

Draft article 17 [14] addresses the facilitation of international assistance in two short paragraphs, simply stating that States should take "necessary measures" to facilitate prompt assistance "in fields such as" visas, customs requirements, taxation and transport. This provides little additional clarity as to what really is expected in the "fields" mentioned, leaving largely intact the existing uncertainty of approach from one State to another (and even from one operation to another in a single State). IFRC recommends that the draft article be enhanced with greater detail.

Draft articles 4, subparagraph (e), and 17 [14], subparagraph (1) (a), treat civilian and military responses exactly the same in terms of facilitation. However, many States and the humanitarian community support the approach of the Oslo Guidelines, which call for military assets to be used only where civilian alternatives are inadequate and state that, when they are used, they should seek to avoid direct dissemination of aid, providing instead infrastructure, transport and other more indirect support. This is meant to emphasize the differences between humanitarian and military personnel, a key issue in the security of humanitarians around the world.

R. Draft article 18 — Protection of relief personnel, equipment and goods

1. Comments received from Governments

Australia

[See the comment above on draft article 11 [16].]

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

With regard to draft article 18 concerning the protection of humanitarian personnel, equipment and goods, the language used is appropriate, but some fine-tuning could be considered in the relevant commentary. As noted in their statements during the drafting process, the Nordic countries agree with the expression "appropriate measures" and regard it as an obligation of conduct for the affected State rather than one of result, owing to the fact that several factors remain beyond the State's control in a disaster situation. It would add value to the draft article to highlight the duty of the affected State to take the best possible and reasonable measures available in the particular circumstances to protect humanitarian personnel, equipment and goods, while following the principle of due diligence.

Germany

We would also like to reiterate our support for draft article 18, given that sufficient protection of deployed personnel, their equipment and goods is crucial to allow States and other actors to provide humanitarian assistance efficiently.

Netherlands

[See the comment above on draft article 17 [14].]

Switzerland

Draft article 18 mentions the obligation to protect relief personnel, equipment and goods as an obligation of means, while under international humanitarian law it is an obligation of result.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs welcomes the inclusion of draft article 18 on the protection of relief personnel, their equipment and goods. Sufficient protection of relief personnel, equipment and goods is an essential condition for any relief operation to be carried out effectively.

World Food Programme

The duty to protect relief personnel, equipment and goods included in draft article 18 is especially welcome and could provide significant protection additional

to that set forth in the Convention on the Safety of United Nations and Associated Personnel, of 1994.[40]

World Bank

If from the onset of a disaster there is clarity that the affected State will not be able to protect relief goods, equipment and personnel, is there any thought of providing for remedies? Would, for example, the affected State have an obligation to allow security personnel onto the territory to provide the protection which the State cannot? It appears that there are precedents where such agreements on armed escorts have been negotiated and successfully implemented.

International Federation of Red Cross and Red Crescent Societies

Draft article 18 acknowledges the obligation of the affected State to take appropriate measures to ensure the protection of relief personnel in its territory. However, the draft article does not recognize any corresponding rights and obligations of actors providing external assistance. Draft article 18 may benefit from additional text to confirm the duties of external actors to consult and cooperate with the affected State on matters of protection and security.

S. Draft article 19 [15] — Termination of external assistance

1. Comments received from Governments

Australia

Australia is cautious as to the effect of draft article 19, which appears to introduce limits on the prerogative of the affected State to freely withdraw its consent to the presence of external actors providing assistance on its territory.

Finland (also on behalf of Denmark, Iceland, Norway and Sweden)

The Nordic countries would like to suggest considering some further revision and elaboration of draft article 19 [15]. The term "termination" used in this draft article does not seem to properly represent or reflect what today is understood as quality and accountability in humanitarian response. Therefore, it would be advisable to reconsider the wording and content of this draft article in the light of these two principles. While the draft article deals with the legal implications of the termination of external assistance, it should not overlook the importance of early recovery measures and the linkages and transition between humanitarian and development assistance. The draft article should, at least in the commentary, take into account the role of the assisting State and other actors in contributing to a responsible transition and handover when ceasing their assistance operations.

Draft article 19 [15] also ignores the issue of repatriation of goods and personnel. For this reason, the Nordic countries would recommend including a clause allowing the assisting State and, as appropriate, other assisting actors, to repatriate their goods and personnel at the end of their humanitarian assistance mission. Alternatively, if deemed more appropriate, such language could be

[40] United Nations, *Treaty Series*, vol. 2051, p. 363, and Optional Protocol of 8 December 2005, General Assembly resolution 60/42, annex.

included in draft article 17 [14] as an actual obligation for the affected State to facilitate the repatriation.

2. Comments received from international organizations and entities

International Federation of Red Cross and Red Crescent Societies

IFRC is pleased to see the attention devoted to promoting an orderly approach to the termination of aid by draft article 19 [15], as its research and consultations have indicated that the lack of communication (or an arbitrary approach to the issue) has often led to unnecessary negative consequences for communities recovering from a disaster.

T. Draft article 20 — Relationship to special or other rules of international law

1. Comments received from Governments

Switzerland

[See the comment below on draft article 21 [4].]

2. Comments received from international organizations and entities

International Federation of Red Cross and Red Crescent Societies

A gap in this draft article is the failure to explicitly acknowledge the role of regional and bilateral agreements and initiatives. Regional agreements in particular are playing a large and growing role around the world in promoting planning and preparedness for disasters among their member States, and any global treaty in this field should more clearly acknowledge this. Draft article 20 should explicitly refer to regional and bilateral arrangements in its text, and not only mention them in the commentaries thereto.

U. Draft article 21 [4] — Relationship to international humanitarian law

1. Comments received from Governments

Austria

Draft article 21 [4], concerning the relationship of the draft articles to international humanitarian law, deals with a major issue relating to the scope of application of the draft articles. According to draft article 1 [1], defining the scope of the draft articles in connection with draft article 3 [3] regarding the definition of disasters, the draft articles apply without distinction to all kinds of disasters, whether natural or man-made, which would include also armed conflicts. Draft article 21 [4] limits the scope insofar as it determines that the draft articles do not apply to situations to which the rules of international humanitarian law are applicable. According to this wording the draft articles do not apply to disasters connected with international and non-international armed conflicts, whereas disasters connected with internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, would be covered.

However, the commentary (in paragraph (3)) presents a different understanding insofar as it states that the draft articles "can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply." According to the commentary, the draft articles would apply also to disasters connected with armed conflicts to the extent that the rules of international humanitarian law do not address this particular disaster situation. This difference between the draft articles and the commentary does not permit a clear understanding of what the Commission envisaged. In Austria's view, the draft articles should apply also to situations of armed conflict, but only insofar as they are not contradicting the particular rules of international humanitarian law.

Czech Republic

The Czech Republic concurs with the commentary to draft article 21 [4], which foresees the applicability of the draft articles also in complex emergency situations, including those of armed conflict, to the extent that international humanitarian law does not apply. Having said that, we feel that the text of the draft article does not reflect the commentary thereto. Furthermore, in general terms, the text of other commentaries that touches upon the relationship of the present draft articles with international humanitarian law does not seem to be in accordance with draft article 21 [4]. Therefore, we suggest that the Commission clearly explain in the relevant commentaries to the draft articles its position regarding the applicability of the draft articles to armed conflict and the relationship with international humanitarian law, and that it consider reformulating the text of draft article 21 [4]. We believe that a further analysis of the relationship between the draft articles and rules of armed conflict would be desirable. It would be very helpful for practitioners if the commentary indicated situations in which international humanitarian law may prevail and thus negate the application of the draft articles, or clarified in which situations the draft articles may apply also in situations of armed conflict.

Netherlands

While underlining the need to carve out situations of armed conflict from the notion of "disaster", the Netherlands notes the potentially broad scope of the current wording of the draft article. In this respect, it could be advisable to rephrase this draft article as a standard "without prejudice" clause.

Switzerland

Switzerland notes that the exclusion of armed conflicts has been removed, thus giving rise to the question of how the draft articles cover situations of armed conflict in which disasters occur.

The commentary to draft article 8 [5] concerning the duty to cooperate explains that "a reference to the International Committee of the Red Cross is included as a consequence of the fact that the draft articles may also apply in complex emergencies involving armed conflict".

The commentary to draft article 20 on the relationship to special or other rules of international law states that: "While it is accepted that in such situations the rules of international humanitarian law should be given precedence over those contained

in the present draft articles, these would continue to apply 'to the extent' that some legal issues raised by a disaster which occurred in the same area as an armed conflict would not be covered by the rules of international humanitarian law. In this manner the present draft articles will contribute to filling possible legal gaps in the protection of persons affected by disasters occurring during an armed conflict." The commentary to draft article 20 specifies neither what those legal gaps are nor how it could contribute to filling them.

The commentary to draft article 21 [4], for its part, states that, "while the draft articles do not seek to regulate the consequences of armed conflict, they can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply".

The commentaries to draft articles 8 [5], 20 and 21 [4] introduce more ambiguity than clarity regarding the relationship between the draft articles and international humanitarian law. What is the relationship between the draft articles and international humanitarian law when a disaster occurs in a situation of armed conflict where there are no hostilities or they have ended? When a disaster occurs in an occupation? This lack of clarity could offer the possibility to States affected simultaneously by a disaster and an armed conflict to choose to apply either the draft articles or international humanitarian law. The exclusion of situations covered by international humanitarian law, in an earlier version of the draft articles, had the advantage of clarity.

2. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs is concerned that draft article 21 [4], which sets out the relationship between the draft articles and international humanitarian law, appears to be inconsistent with the commentary. In particular, draft article 21 [4] provides: "The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable." This appears to suggest that these draft articles do not apply at all to so-called "complex disasters" that occur on the same territory where an armed conflict is taking place — i.e. where international humanitarian law is applicable. Yet the commentary to draft article 21 [4] appears to contradict this when it states that the draft articles "can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply". Moreover, this formulation can be read as mistakenly suggesting that there may be situations of armed conflict to which international humanitarian law does not apply. Finally, the commentary to draft article 4, in subparagraph (a), refers to "the recognition, in draft article 21 [4], that the draft articles would apply in the context of so-called 'complex disasters', which occur on the same territory where an armed conflict is taking place".

The Office for the Coordination of Humanitarian Affairs is concerned that the wording in draft article 21 [4] and the commentary do not offer a clear understanding of the relationship between the draft articles and international humanitarian law. The Office considers that the draft articles should apply to so-called "complex disasters" that occur on the same territory on which an armed conflict is taking place (a) without prejudice to the parallel application of

international humanitarian law, and (b) where the rules of international humanitarian law do not address the specific disaster-related issue. This would appear to be the goal of both the draft article and the commentary and, if this is correct, should be more clearly stated.

European Union

As a first observation, the European Union notes that the content of the draft article does not seem to match the commentary thereto. In particular, paragraph (2) of the commentary states that a "categorical exclusion could be counterproductive, particularly in situations of 'complex emergencies' where a disaster occurs in an area where there is an armed conflict" or, where a disaster predated the armed conflict.

Notwithstanding this inconsistency, these "complex emergencies" pose the question of how best to address people's needs in such a situation.

The European Union therefore suggests that the relationship between the draft articles and international humanitarian law be constructed as a "without prejudice" clause, in order to ensure the applicability of the draft articles in situations of complex emergency, and that it be clarified in the commentary to draft article 21 [4] that nothing in the draft set of articles can be read or interpreted as affecting international humanitarian law.

International Committee of the Red Cross

In light of the broad definition of disaster adopted by the Commission, draft article 21 [4], dealing with the relationship with international humanitarian law, becomes crucial in order to avoid overlaps and conflict of provisions between international humanitarian law and the draft articles.

In this regard, ICRC would like to flag the important discrepancy existing between the rule contained in draft article 21 [4] ("the present draft articles do not apply to situations to which the rules of international humanitarian law are applicable") and its commentary.

In its current form, draft article 21 [4] excludes entirely armed conflicts from the scope of the draft articles. However, the commentary to this draft article is much more nuanced when it affirms that the draft articles would apply in situations of "complex emergency", where a disaster occurs in an area where there is also an armed conflict. This contradiction between draft article 21 [4] and its commentary obscures the understanding of what the Commission has envisaged for the relationship between the draft articles and international humanitarian law.

Therefore, ICRC recommends aligning the commentary with the text of the draft article 21 [4] so that the draft articles do not apply in situations of armed conflict, including in "complex emergencies" as defined by the Commission's commentaries.

ICRC understands that the rationale for applying the draft articles in situations of "complex emergency" is to maximize the protection of individuals and to avoid potential gaps in current international law. Indeed, the Commission maintains that excluding situations of armed conflict could be detrimental to the protection of persons, in particular when the onset of a disaster predates the armed conflict,

because of potential gaps existing in international humanitarian law and the potential inapplicability of certain rules of international humanitarian law.[41]

However, the Commission does not clarify, in the commentary, what would be those potential gaps in international humanitarian law, what would be the exact adverse effects, in terms of protection, of applying only international humanitarian law, and how certain rules of international humanitarian law would not apply in situations where armed conflict and disaster occur concomitantly. In this regard, ICRC is of the position that there are no such gaps in international humanitarian law as perceived by the Commission and that the application of international humanitarian law in "complex emergencies" would have no adverse effect on the protection of individuals. On the contrary, the very object and purpose of international humanitarian law is to protect all those affected by armed conflict, including those affected by "complex emergencies". In this perspective, the rules of international humanitarian law upholding, inter alia, humane treatment and human dignity, and ensuring that the basic needs of the population affected by armed conflict are met (through the primary obligation incumbent upon the parties to the armed conflict to ensure the provision of supplies essential for the survival of the population, or to allow relief schemes if they are unable or unwilling to fulfil that primary obligation), will also benefit all those impacted by "complex emergencies".

International humanitarian law applies in situations of armed conflict, including in situations where armed conflict overlaps with a natural disaster and, in the view of ICRC, contains a set of sufficiently detailed provisions to deal with the protection and assistance issues arising from "complex emergencies". Indeed, this body of law is tailored to armed conflicts and sets out an important and effective protective framework for those affected by such situations and regulates humanitarian access through detailed provisions aimed at ensuring that the basic needs of the population concerned are met. In this regard, international humanitarian law imposes certain constraints on Governments' discretion to refuse and control outside humanitarian assistance that do not otherwise apply outside of a context of armed conflict. Moreover, armed conflict situations raise concerns different in type and degree concerning humanitarian independence, security and access.

In summary, from the ICRC perspective, it is crucial that the draft articles and their commentaries not contradict the rules of international humanitarian law. Taking into account the current content of the draft articles, the only way to reach that objective would be to ensure that the draft articles and their commentaries unambiguously exclude situations of armed conflict from the scope of application of the draft articles, as requested for several years by a critical mass of States while discussing the reports of the Commission in the Sixth Committee of the General Assembly. This could be done either by including such an exclusion in draft article 3 [3], defining the notion of disaster, or by ensuring that the commentary to draft article 21 [4] faithfully reflects the current black-letter rule contained in the corresponding draft article.

ICRC therefore favours a clear exclusion of situations of armed conflict, international or non-international, from the scope of the draft articles, because both the relevant international legal framework and the operational dynamics of

[41] See para. (4) of the commentary to draft article 20 [4] and paras. (2) and (3) of the commentary to draft article 21 [4].

humanitarian assistance operations are very different in "peacetime" disasters and situations of armed conflict.

As they stand, the draft articles and their commentaries elevate the risk of conflict of norms with international humanitarian law, adversely impact the integrity of this body of law and may undermine the ability of impartial humanitarian organizations such as ICRC to carry out their humanitarian activities in a principled manner and in accordance with the mandate assigned to them by States.

International Federation of Red Cross and Red Crescent Societies

Draft article 21 [4] states that the draft articles will not apply in situations where international humanitarian law applies. However, according to the commentaries to draft articles 4, 8 [5] and 21 [4], the Commission is of the view that there can be situations of armed conflict to which international humanitarian law does not apply and it is the Commission's intention that the draft articles should apply in situations of mixed conflict and disaster. In this vein, the commentary to draft article 8 [5] notes that ICRC has been specifically named in the draft articles because they may apply in "complex emergencies involving armed conflict".

IFRC believes that the draft articles should not apply in situations of armed conflict. The particular dynamics of conflict have not been adequately considered in their design. These include, among others, the frequent impulse of the parties to limit humanitarian assistance out of concern that the opposing side will benefit from it, even indirectly. For this reason, the approach to humanitarian assistance of the Fourth Geneva Convention[42] (particularly articles 59 and 62) and of customary international humanitarian law, as articulated by the ICRC study of 2005[43] (particularly rules 55 and 56), differs markedly from that found in instruments focused on non-conflict disasters, in particular by much more strongly circumscribing States' authority to regulate aid efforts. No such distinction has been made here, and no guidance is provided as to when international humanitarian law would or would not apply (as, indeed, none could be expected, as this is not the appropriate instrument to fundamentally define the scope of the Geneva Conventions). This invites confusion and contradiction without adding real value in operations.

Ideally, the draft articles would exclude armed conflict from their definition of "disaster" in order to avoid this problem. This was the approach strongly favoured by States when the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance were negotiated in 2007. However, the solution proposed in draft article 21 [4] would be acceptable if the contradictory comments in the commentaries were removed and no impression were given that there could be "mixed situations" of conflict and disaster where international humanitarian law does not apply.

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[42] Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, United Nations, *Treaty Series*, vol. 75, p. 287.

[43] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge, United Kingdom, Cambridge University Press, 2005).

III. Comments on the final form of the draft articles

A. Comments received from Governments

Australia

Australia observes that there is an existing body of international law sufficient to provide the legal underpinnings of disaster risk reduction and response efforts. This is in turn complemented by a broad range of domestic legal and policy decisions, which more properly fall within the sovereign competence of States. Accordingly, Australia considers that the Commission's work will be most valuable where it helps States to understand and implement their prevailing obligations. In that regard, Australia compliments the Commission on its extensive consideration of existing obligations and presentation of the draft articles, which consolidate those obligations. On the other hand, those elements of the draft articles which seek to develop or create new duties or obligations would, for the time being, seem to be more appropriately pursued as best practice principles or guidelines.

Netherlands

The Netherlands wishes to underscore that the draft articles can be seen as an authoritative reflection of contemporary international law or as an attempt to progressively develop the law. However, it should be clear that the draft articles themselves are not legally binding.

B. Comments received from international organizations and entities

Office for the Coordination of Humanitarian Affairs

The Office for the Coordination of Humanitarian Affairs would support the inclusion in the commentary of a reference to the status of the draft articles (e.g. as binding or non-binding, serving as a reference tool, etc.). The Office would support further discussion on whether the draft articles should form the basis for a binding international treaty.

World Food Programme

WFP welcomes the possibility that the draft articles may become a treaty in the area of disaster response. The existence of a treaty in this area would be particularly useful in countries where WFP has not concluded a host agreement or where it has not been able to address comprehensively the aspects covered by the draft articles. WFP takes note of draft article 20, which clarifies that the draft articles do not derogate from the application of bilateral host agreements concluded between United Nations organizations and an affected State. Also in this context, WFP is hopeful that negotiations with State actors will benefit from the existence of a legal framework for assistance and that this will allow "assisting actors", as defined in the draft articles, to focus negotiations with affected States more specifically on what is needed to reduce the risk of emergencies and respond to them.

International Organization for Migration

IOM looks forward to the adoption of the draft articles in the form that States will consider the most appropriate.

European Union

In the first place, it is the European Union's view that the outstanding work of the Special Rapporteur and the Commission have already contributed significantly to the reflection on how best to codify and progressively develop the area of international disaster response law, which will steer the international community in its assistance to persons affected by man-made and natural disasters.

As the text stands at present, the European Union wishes to reiterate that the draft articles are already now an important contribution — whatever the form they may take — in support of persons in the event of disasters.

International Federation of Red Cross and Red Crescent Societies

If the draft articles were adopted in the form of a framework treaty, they could have a positive impact on accelerating the development of more detailed national laws and procedures about international disaster cooperation.

As already expressed in previous statements before the Sixth Committee of the General Assembly, IFRC feels that there is little point in issuing the draft articles as non-binding guidelines. This would risk significant confusion and overlap with existing "soft-law" documents, such as the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, which have already been endorsed by States and provide a great deal more detail about how to handle operational issues. On the other hand, in principle, a global treaty could add value, first by providing greater momentum for current efforts to develop rules at the domestic level, which remain very slow and arduous despite repeated emphasis at the International Conference of the Red Cross and Red Crescent in non-binding resolutions, and second, by establishing clearer reciprocity of commitments between receiving States and international responders. Alternatively, it is possible that the Commission's effort may be taken up at the regional level, where there is a great deal of momentum in the development of new instruments.

However, some members of IFRC have questioned whether States will have the appetite to take up such a project and have expressed concern about whether it might distract from developments at the national level. Even if there is willingness for a treaty, concerns have been raised whether it would be more conservative in its vision of how assistance is managed than current practice.

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Protection of persons in the event of disasters

Additional comments and observations received from Governments

Addendum

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I. Introduction

Two additional written replies, containing comments and observations on the draft articles on the protection of persons in the event of disasters, adopted on first reading by the International Law Commission at its sixty-sixth session (2014), were received from Mexico (24 March 2016) and the United States of America (13 April 2016).

II. Comments and observations received from Governments

A. General comments and observations

United States of America

Although the United States of America has some specific concerns regarding the draft articles described in more detail below, it strongly supports the Commission's efforts to improve protection for persons affected by disasters.

First, the United States remains concerned that several of the draft articles (including as described in the commentary) appear to articulate new legal "rights" and "duties", or to represent inaccurately the existing obligations of States. In some cases the draft articles and commentary appear to represent attempts to develop the law progressively without specifically acknowledging that intention. The United States emphasizes its view that the Commission could best contribute to improving protection for persons affected by disasters by providing practical legal guidance, based on existing international law, to countries in need of or providing disaster assistance. For example, countries may be interested in ways they can incorporate international legal principles into their domestic laws on disaster response, or bilateral or regional agreements or arrangements for humanitarian assistance in the event of disasters. Therefore, the United States recommends that the Commission consider converting these draft articles into a more appropriate form for this purpose, such as principles or guidelines. If they remain as draft articles, the United States recommends that the commentary acknowledge that certain of the draft articles reflect proposals for progressive development of the law and should not, as a whole, be relied upon as a codification of existing law.

Secondly, whether the content is framed as rules or guidelines, the United States is concerned that some of the draft articles, as currently drafted, could impede the effective provision of assistance to persons affected by disasters. As explained in more detail below, draft article 14 [11] requires the consent of the affected State as a condition for the provision of external assistance, and fails to consider the possibility that some assistance could be permissible even in the absence of consent in certain circumstances. It is also ambiguous as to whether external assistance may be provided when consent is arbitrarily withheld. Draft article 16 [12] creates an unhelpful and impractical distinction between States, the United Nations and "other competent intergovernmental organizations", which have the "right" to offer assistance, and "relevant non-governmental organizations", which "may" offer assistance. Furthermore, there are some draft articles, noted below, which could benefit from clarification in order to avoid confusion among actors responding to a crisis. The United States would encourage the Commission to reconsider specific draft articles, identified below, in light of the stated purpose of the document.

Thirdly, as described in detail below in connection with draft article 3 [3], the United States has questions and concerns about the definition of "disaster" and considers it to be overbroad. In particular, the definition of disaster should clearly exclude events that routinely occur in armed conflict. Moreover, with respect to armed conflict, the United States considers draft article 21 [4] and its commentary to be an insufficient response to the discord between the draft articles and international humanitarian law. The United States would strongly prefer to define "disaster" in a way that does not include the consequences of armed conflict. The Commission could then explain, either in the commentaries or in a subparagraph of the definition, that a disaster may coincide in time and space with events constituting part of an armed conflict, and that in such a case — the "complex disaster" with which the Commission appears to be concerned — the draft articles apply to responses to the "disaster", while international humanitarian law applies to the conduct of the armed conflict, including the protection of war victims and belligerent occupation.

B. Specific comments on the draft articles

1. Draft article 1 [1] — Scope

United States of America

With respect to paragraph (2) of the commentary, the United States reiterates its concern with the approach of articulating new "rights" and "duties" of States. In particular, it disagrees with the suggestion that such "duties" apply not just to persons within each State's territory but to all persons "under [each State's] jurisdiction or control". Although some specific provisions of treaties do impose obligations on States parties outside their territories, international law generally does not.

In addition, to the extent the draft articles address obligations on "international organizations and other entities", the draft articles should reflect that international organizations and other entities may be under different legal obligations, which may also differ from those of States.

2. Draft article 2 [2] — Purpose

United States of America

The United States strongly supports the purpose identified in draft article 2 [2]. However, as explained throughout these comments, it has concerns that certain draft articles, as currently drafted, may be inconsistent with that purpose.

Paragraph (9) of the commentary incorrectly asserts that "some of the relevant rights are economic and social rights, which States have an obligation to ensure progressively". While the United States agrees that States parties to the International Covenant on Economic, Social and Cultural Rights[1] are obligated to realize economic, social and cultural rights progressively, non-State parties do not have such an obligation. Furthermore, as a technical matter, the commentary

[1] International Covenant on Economic, Social and Cultural Rights, 1966, United Nations, *Treaty Series*, vol. 993, p. 3.

misstates the obligation described in article 2, paragraph 1, of the Covenant. The United States suggests the following edit:

> "Some of the relevant rights are economic and social rights, which States Parties to the International Covenant on Economic, Social and Cultural Rights have an obligation to ~~ensure~~ realize progressively."

Paragraph (10) of the commentary incorrectly refers to the right to life, and specifically to the International Covenant on Civil and Political Rights, article 6, paragraph 1,[2] as an example of a human right applicable in the context of a disaster and in responding to such a disaster. That provision prohibits the arbitrary deprivation of life through State action and requires protection of that right by law. There is no basis for regarding this provision as the source of any international obligation of a State to address the threat or jeopardy to life caused by a disaster or calamitous event affecting that State. Any such responsibility derives from the sovereign responsibility of Governments *vis-à-vis* their population and citizenry. The United States urges deletion of the last sentence of paragraph (10) and any reference to the International Covenant on Civil and Political Rights, as inappropriate in this context.

3. Draft article 3 [3]

Definition of disaster

Mexico

In the definition of the term "disaster", no limitation is included concerning the origin of the event, that is, whether natural or man-made. This is appropriate, since the text recognizes that there are disasters that may be man-made.[3] However, it should be made clear that armed conflict is not included in this category, in accordance with draft article 21 [4].

United States of America

The United States has significant concerns with the Commission's proposed definition of "disaster" in draft article 3 [3]. First, the United States questions the decision to define disaster in terms of an "event", rather than in terms of the consequences of an event combined with vulnerable social conditions. As the commentary notes, the majority of the non-binding instruments that specifically address disasters focus on the types of hazards and social conditions of vulnerability that disrupt the normal functioning of a community or society. Furthermore, since the first reading of these draft articles, States have adopted the non-binding Sendai Framework for Disaster Risk Reduction 2015-2030,[4] which also focuses on hazards, vulnerability and risks, and the Commission should take into consideration that broadly negotiated framework. The commentary suggests that the Commission considered the definition of "disaster" in the draft articles to be more concise and

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[2] International Covenant on Civil and Political Rights, 1966, United Nations, *Treaty Series*, vol. 999, p. 171.

[3] See European Court of Human Rights, *Öneryıldız v. Turkey*, application No. 48939/99, judgment of 30 November 2004, paras. 9-43; see also Court of Justice of the European Union, *European Parliament v. Council of the European Communities* ("Chernobyl" case), case No. C-70/88, 22 May 1990, paras. 937-943.

[4] General Assembly resolution 69/283, annex II.

precise than those in non-binding frameworks, and the United States would appreciate a more detailed explanation of why the Commission takes this view. In addition, the United States suggests that the Commission consider how this definition relates to draft articles 10 [5 ter] and 11 [16], which are framed in terms of States' efforts to reduce the risks of disasters. Defining a disaster as an event could, in fact, obscure the importance of addressing exposure and vulnerability.

Secondly, regardless of whether the definition is stated in terms of risks or events, it should be clarified so that it clearly does not include events such as situations of armed conflict or other political and economic crises. Paragraph (1) of the commentary helpfully explains that the Commission did not intend to include "political and economic crises" within the definition of disaster. However, the text of draft article 3 [3] does not explicitly exclude political or economic crises, and many political and economic crises would seem to meet the definition of disaster in draft article 3 [3]. For example, a stock market crash, a deflationary crisis, or a crime wave could be "calamitous" and lead to "great human suffering and distress" that "seriously disrupt[ed] the functioning of society".

In particular, armed conflicts almost invariably produce "calamitous ... series of events resulting in widespread loss of life, great human suffering and distress, [and] large-scale material or environmental damage, thereby seriously disrupting the functioning of society". In response to the tragic consequences of armed conflict, international humanitarian law has, over centuries, been developed as a body of principles and rules to address the humanitarian consequences of armed conflict. International humanitarian law rules have been articulated primarily in negative terms, as a body of rules selectively limiting the means and methods by which one party may injure its adversary.

The present draft articles are laudable as an effort to address the humanitarian effects of natural disasters and certain other non-conflict-related man-made disasters such as environmental accidents (e.g., chemical spills or failed dams). However, the proposed definition is so broad as to cover almost any significant disruptive event. In particular, the draft articles are deeply problematic as applied to situations of armed conflict, insofar as they have the potential to conflict with international humanitarian law.

Draft article 5 [7], for example, would create an obligation on the part of States (among other actors) not only to respect but to protect "the inherent dignity of the human person". As noted in the commentary to draft article 5 [7], this obligation, which in the Commission's view flows from international human rights law, would entail "a negative obligation to refrain from injuring the inherent dignity of the human person and a positive obligation to take action to protect human dignity". This rule may, in application, be in strong tension with the balance reflected in the rules of international humanitarian law. International humanitarian law affords certain protections to civilians, depending on the circumstances, but recognizes that civilians may be incidentally injured or killed (but not specifically targeted) in the course of fighting.

Likewise, the duty articulated in draft article 11 [16] to reduce the risk of "disasters", when applied to events constituting part of an armed conflict, could be viewed as imposing responsibilities on parties to a conflict beyond those contained in international humanitarian law (which requires, for example, that parties take feasible precautions in attack and in defence). The potential for this result is

highlighted by the Commission's assertion in the commentary that what is set out in draft article 11 [16] is an "international legal obligation to act in the manner described".

The United States believes that the Commission should maintain draft article 21 [4], which makes clear the intent not to revise international humanitarian law rules, and remove the consequences of armed conflict from the scope of the definition of "disaster". The Commission could note, either in the commentaries or in a subparagraph of the definition, that a disaster may happen to coincide in time and space with events constituting part of an armed conflict, and that in such a case the draft articles apply to responses to the "disaster", while international humanitarian law applies to the conduct of armed conflict. The United States would urge the Commission to consider adopting this simplified approach, which would avoid the need for many assessments as to whether international humanitarian law was applicable. The United States recommends explicitly excluding, at a minimum, events that routinely occur during armed conflict from the definition of "disaster". The Commission also may want to consider a definition that expressly excludes political and economic crises.

[See also the comments below under draft article 21 [4]].

4. **Draft article 4**

Use of terms

Mexico

The inclusion of draft articles 4, 14 [11], 17 [14], 18 and 19 [15] is welcome, since they reflect the concerns expressed by various delegations.

United States of America

With respect to draft article 4, subparagraph (a), the United States is concerned by the inclusion of "otherwise under [its] jurisdiction or control" in the definition of "affected State". The United States thinks this standard sets the bar for triggering the present draft articles too low and sows confusion with respect to the application of other draft articles. Under this definition, a State could become an "affected State" when "persons, property or the environment" under its mere "jurisdiction" or "control" — a form of influence falling well short of territorial sovereignty — are affected by a disaster. Such a State, as an affected State, would then have, inter alia, corresponding duties to seek external assistance (draft article 13 [10]), take "the primary role in the direction, control, coordination and supervision of [disaster] relief and assistance" (draft article 12 [9]), and facilitate external assistance through a variety of legal measures (draft article 17 [14]), and the right to require consent to the provision of any assistance (draft article 14 [11]).

All of the aforementioned duties and rights are in potential conflict with the prerogatives of the State with sovereignty over the territory in which the disaster occurs. This tension arises in the very phrasing of the draft article. Specifically, draft article 12 [9], paragraph 1, asserts that the affected State — even if that State is "affected" by virtue of mere "jurisdiction" or "control" over persons or property, and not by virtue of any degree of territorial sovereignty — has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory "by virtue of its sovereignty". Indeed, the Commission notes in the

commentary to draft article 4 that under these definitions there could be multiple "affected States", and that, in the absence of any special agreement between them, the draft articles "d[o] not ... provide a definitive solution as to which affected State's consent would be required" under draft article 14 [11]. The United States considers this a most unsatisfactory situation. It creates the potential for confusion or disagreement among "affected States" that could delay an effective response.

Regarding draft article 4, subparagraphs (b) and (c), the United States would suggest deleting "at its request or with its consent". This aspect of the definition is not necessary, as requests for and consent to assistance are addressed in more detail in other draft articles.

In draft article 4, subparagraph (e), the use of the term "sent by" in the definition of "relief personnel" could be read to preclude the local hires of the "assisting State or other assisting actor". The United States believes draft article 18 (protection of relief personnel, equipment and goods) should apply to local relief workers, not just international workers. Therefore the United States suggests changing the definitional language to "sent in or locally recruited by".

The commentary, in paragraph (12), states that domestic non-governmental organizations are not covered in the draft articles. The United States believes that such organizations should be held to the same standard as external assisting organizations and should receive similar consideration. Given the role that domestic organizations, such as National Red Cross and Red Crescent Societies, play in disaster preparation and response, the United States recommends considering their appropriate inclusion in these draft articles. For example, if the commentary were revised, States would be expected to cooperate with and seek assistance from relevant domestic non-governmental organizations (draft articles 8 [5] and 13 [10]).

5. Draft article 5 [7]

Human dignity

United States of America

Although the United States agrees that respect for human dignity should be a key component of disaster preparation and response, it disagrees that States, international organizations and relevant non-governmental organizations have a general legal obligation to "respect and protect the inherent dignity of the human person". Paragraph (1) of the commentary asserts that this principle derives from international human rights instruments. Many of these instruments, such as the International Covenant on Civil and Political Rights, recognize the inherent dignity of the human person, and state that the rights identified in the instrument derive from it. However, they do not impose any special or distinct obligation to protect "dignity". To the extent this draft article is intended to refer to the specific obligations of States parties to treaties to protect rights that derive from the principle of human dignity, protection of human rights is already addressed in draft article 6 [8]. Accordingly, the United States recommends changing "shall" to "should".

The United States disagrees, as a legal matter, with the statement in paragraph (6) of the commentary that "the duty to protect" requires States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity, even though this statement reflects a

worthy policy objective. The commentary does not identify the source of this duty, and the sources in this paragraph are all non-binding guidelines and principles. To the extent this is an attempt to develop the law progressively, it should be clearly identified as such and state the legal support for this development.

See also the general comments under draft article 3 [3] concerning the relationship between the draft articles and international humanitarian law.

6. Draft article 6 [8]

Human rights

Mexico

It would be appropriate to add a reference to the power of States, established in different international human rights instruments, to suspend certain rights in certain circumstances, for example, in situations in which State security is threatened,[5] which may happen in the event of a disaster in the context of these draft articles.[6] In that regard, Mexico appreciates the fact that, in the commentary to this draft article, the Commission recognizes the possibility of derogation; however, this possibility is not obvious from the current wording of the draft articles.

United States of America

The United States agrees that States should promote and protect the human rights of individuals in their territory, including those affected by disaster, in accordance with their obligations under international human rights law. The United States appreciates the explanation in the commentary, paragraph (4), that different States have different legal obligations in this respect.

See also the general comments under draft article 3 [3] concerning the relationship between the draft articles and international humanitarian law.

7. Draft article 7 [6]

Humanitarian principles

United States of America

The United States greatly appreciates the inclusion in the draft articles of the humanitarian principles, which are incredibly important to humanitarian responses. However, it would suggest replacing "in accordance" with "consistent", which would be more accurate given the non-binding nature of the principles.

The United States also appreciates that draft article 7 [6] reflects the importance of non-discrimination during the response to and recovery from disasters. The United States suggests including disability explicitly within the second sentence of paragraph (6) of the commentary and adding a citation to the Convention on the Rights of Persons with Disabilities[7] in the footnote. It would also

[5] International Covenant on Civil and Political Rights, 1966, United Nations, *Treaty Series*, vol. 993, p. 3, art. 4; American Convention on Human Rights, 1969, United Nations, *Treaty Series*, vol. 1144, p. 144, art. 27; European Convention on Human Rights, art. 15.

[6] This was the case in Ecuador, where a state of emergency was declared following the explosion of the Cotopaxi volcano.

[7] Convention on the Rights of Persons with Disabilities, United Nations, *Treaty Series*, vol. 2515, p. 3.

suggest that, with respect to "the needs of the particularly vulnerable", the commentary highlight the need to minimize the risks of, and address the effects of, harm, exploitation and abuse for disaster-affected populations. For example, there is often an increased risk of exploitation and abuse in the aftermath of a disaster, particularly trafficking of children and adolescent girls.

8. Draft article 8 [5]

Duty to cooperate

United States of America

The United States reiterates its general comments regarding the articulation of what appear to be new "rights" and "duties" of States. Although it recognizes the principles of cooperation among States reflected in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[8] it does not agree that they impose a specific legal obligation to cooperate with the broad range of organizations listed in this paragraph. Cooperation with external organizations is certainly desirable and may often be beneficial, but which organizations may be most helpful will depend on the particular circumstances of the affected State and the disaster. Thus, the United States recommends that "shall" be changed to "should".

In paragraph (2) of the commentary, the United States recognizes that international cooperation may take on special significance with respect to particular human rights obligations, but also believes the commentary should reflect that different States have assumed different obligations. It suggests the following clarifying edits: "Cooperation may take on special significance with regard to certain international human rights ~~law~~ obligations undertaken by States parties to specific treaties."

In addition, paragraph (2) of the commentary should more closely track article 11 of the Convention on the Rights of Persons with Disabilities, which simply reaffirms existing international obligations. The United States therefore suggests the following addition, from article 11 of the Convention: "International cooperation gained particular prominence in the 2006 Convention on the Rights of Persons with Disabilities, which provides that States parties "'shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities ~~is, inter alia, applicable~~ in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.'"

See also the general comments under draft article 3 [3] concerning the relationship between the draft articles and international humanitarian law.

[8] General Assembly resolution 2625 (XXV).

9. **Draft article 9 [5 bis]**

Forms of cooperation

Mexico

Given the broad scope of the draft articles and bearing in mind the wide variety of phenomena covered by them, the wording of this draft article should not give the impression of being exhaustive and of consequently limiting the forms of cooperation that could be provided under the draft articles.

United States of America

[See the comments below under draft article 10 [5 ter]].

10. **Draft article 10 [5 ter]**

Cooperation for disaster risk reduction

United States of America

The United States reiterates its general comments regarding the attempt to articulate new "rights" and "duties" in the draft articles, and its comments on draft article 11 [16].

Accordingly, the United States suggests changing "shall" to "should". It also questions whether it is necessary to include this language in a stand-alone article. It would recommend revising draft article 8 [5] to clarify that cooperation includes efforts to reduce the harms of disasters, or revising draft article 9 [5 bis] to include disaster risk reduction as one of the forms of cooperation. If it is to remain a stand-alone article, the United States recommends adding "as appropriate" at the end, which is consistent with the language on cooperation in draft article 8 [5]. As noted in existing non-binding frameworks on disaster risk reduction, each State has the primary responsibility to take measures to reduce the harms caused by disasters in its own territory. Other States may assist in these efforts, as appropriate.

11. **Draft article 11 [16]**

Duty to reduce the risk of disasters

United States of America

The United States recognizes the importance of each State taking measures to prevent, mitigate and prepare for disasters that could affect its people. However, as previously noted, the United States has concerns with the attempt to articulate new "rights" and "duties" in the draft articles. It disagrees with the assertion in paragraph (9) of the commentary that each State has an obligation under international law to take the necessary and appropriate measures to prevent, mitigate and prepare for disasters.

Paragraph (4) of the commentary suggests that the Commission derived this very specific obligation from the general principles of State sovereignty and non-intervention, but does not provide any explanation of how it was derived, or what the limiting principles might be on which obligations States have as a consequence of their sovereignty. The commentary further suggests that international human rights law supports the creation of a new obligation on States with respect to reducing the risk of disasters. The United States strongly disagrees

with the assertion in the commentary that States have an affirmative obligation to take "necessary and appropriate measures" to prevent human rights violations "no matter the source of the threat". International human rights law applies to States and regulates their conduct with respect to the human rights of individuals in their territory. It does not impose a general obligation on States to protect individuals from private actors, or from the forces of nature. The right to life, as proclaimed in the Universal Declaration of Human Rights, article 3, and elaborated in the International Covenant on Civil and Political Rights, article 6, imposes no duty or obligation on a State affected by a disaster with respect to the protection of individuals from the effects of such disaster and would not require such a State to seek assistance from other States or organizations in this regard.

The commentary suggests that State practice supports this new rule. The voluminous information gathered by the Commission describing national and international efforts to reduce the risk of disasters is impressive and valuable, but the United States does not believe that such information establishes widespread State practice undertaken out of a sense of legal obligation; rather, national laws are adopted for national reasons and the relevant international instruments typically are not legally binding. Notably, the two most significant international frameworks on disaster risk reduction — the Hyogo Framework[9] and the recently adopted Sendai Framework — are both non-binding. As such, there is no basis to conclude that this is a rule of customary international law.

In addition, as explained in the comments of the United States on draft article 3 [3], contemporary approaches to disaster risk reduction focus on minimizing the harm caused by disasters, and the definition of disaster in terms of "events" fails to adequately reflect this approach. If the current definition of disaster is retained, the United States would recommend revising the language of this draft article to focus on harm reduction. Consequently, it would recommend revising the title of this draft article to read: "Responsibility to reduce the risk of disasters", and the first subsection to read: "Each State should reduce its vulnerability to the risk of disasters ...". Alternatively, to the extent this draft article reflects progressive development of the law regarding States' obligations, it ought to be identified as such in the commentary.

Paragraph (17) of the commentary states that the three types of measures noted in paragraph 2 of the draft article are not exhaustive. The United States believes the provision would be strengthened by including a reference to measures that not only identify and communicate risk, but also actually mitigate the risk of future loss of life from future events. To realize meaningful risk reduction, actions should actually be taken to address the assessed risk, such as updating building codes, retrofitting structures against wind and seismic hazards, or elevating or relocating homes out of the flood plain.

Lastly, the United States would emphasize that stating a legal obligation to reduce the risk of disasters is particularly problematic in light of the broad definition of "disasters", as discussed in its general comments on draft article 3 [3]. If one considers "disasters" to include armed conflict or other serious political or economic crises, this draft article would reflect legal requirements to take measures

[9] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters, adopted at the World Conference on Disaster Reduction, Kobe, Hyogo, Japan, 18-22 January 2005 (A/CONF.206/6 and Corr.1, chap. I, resolution 2).

to reduce the risk of disasters that would reach well beyond steps that should be taken with respect to natural disasters or certain man-made disasters (e.g., chemical spills or failed dams). For example, it could raise questions as to whether States have an obligation to engage in diplomatic steps that might reduce the likelihood of an outbreak of hostilities, or fiscal policy measures that might reduce the risk of an economic calamity, but the efficacy or appropriateness of such measures is hardly susceptible to objective assessment.

12. Draft article 12 [9]

Role of the affected State

Mexico

Mexico recognizes that this draft article reflects the primary obligation of States to protect persons and provide humanitarian assistance in the event of disasters;[10] however, Mexico suggests adding the expression "within its capabilities", since in the hypothetical situation in which an affected State lacked the capacity to comply with this rule, it would not be responsible for failing to do so, in accordance with the *ad impossibilia nemo tenetur* principle.

United States of America

As with draft article 11 [16], the commentary fails to explain how the very specific obligation in draft article 12 [9], paragraph 1, has been derived from the general principle of State sovereignty, or what the limiting principles might be on which obligations States have as a consequence of their sovereignty. The United States recommends revising this paragraph to delete "by virtue of its sovereignty", and to replace "has the duty to" with "should". Alternatively, to the extent this draft article reflects progressive development of the law, it ought to be identified as such.

13. Draft article 13 [10]

Duty of the affected State to seek external assistance

Mexico

It is appropriate to establish the right of affected States to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and competent non-governmental organizations. However, in the interests of the principle of State sovereignty, which involves the exclusive right to display the activities of a State provided that the obligation to protect, within the territory, the rights of other States is fulfilled,[11] Mexico suggests that the term "has the duty to" be replaced by "may", so that States, in accordance with their primary obligation to protect persons and provide humanitarian assistance in the event of disasters,[12] can exercise the primary role in the direction, control, coordination and supervision of the provision of disaster relief and assistance on their territory, in accordance with draft article 3.

[10] See ASEAN Agreement on Disaster Management and Emergency Response, Vientiane, 26 July 2005; A/CN.4/696; E/CN.4/1998/53/Add.2, annex.

[11] *Island of Palmas* case, (Netherlands, United States of America), award of 4 April 1928, *Reports of International Arbitral Awards*, vol. II, p. 839 (Max Huber).

[12] See ASEAN Agreement on Disaster Management and Emergency Response, Vientiane, 26 July 2005; A/CN.4/696; E/CN.4/1998/53/Add.2, annex.

United States of America

As with draft articles 11 [16] and 12 [9], the United States has concerns regarding the derivation of a specific "duty" to seek assistance from particular entities based on the general principle of sovereignty. To the extent that the commentary is intended to suggest that international human rights law establishes a general obligation to protect individuals from non-State actors and natural forces, the United States disagrees. It recommends revising this subsection to change "has the duty to" to "should". In this case, the United States supports clarifying in the commentary that a disaster does not relieve a State of the human rights obligations it has undertaken, which may include, in certain circumstances, asking for assistance in the event of a disaster that exceeds its national response capacity. Alternatively, to the extent this draft article reflects progressive development of the law, it ought to be identified as such.

For the reasons that the United States stated with respect to draft article 2 [2] (and paragraph (10) of the commentary), paragraph (4) of the commentary incorrectly includes the right to life among the human rights directly implicated in the context of a disaster. The right to life, as proclaimed in the Universal Declaration of Human Rights, article 3, and elaborated in the International Covenant on Civil and Political Rights, article 6, imposes no duty or obligation on a State affected by a disaster with respect to the protection of individuals from the effects of such disaster and would not require such a State to seek assistance from other States or organizations in this regard. All references to right to life should be removed from this paragraph, including the sentence referring to that right as non-derogable under the Covenant. Indeed, the fact that the Human Rights Committee has advised, in its General Comment No. 29, that a "natural catastrophe" may in certain situations constitute a "public emergency which threatens the life of the nation" and, upon official proclamation, thereby justify certain State measures in derogation of some of that State's obligations under the Covenant (excluding its obligation not to deprive anyone of the right to life), has no bearing on whether an affected State owes a duty to its population to address the effects of the disaster or to seek the assistance of other States in doing so.

Paragraph (4) of the commentary also imprecisely characterizes several of the economic, social and cultural rights described in the International Covenant on Economic, Social and Cultural Rights. The United States recommends that the commentary track the language from the Covenant and the international community's understanding of the right to safe drinking water and sanitation, as follows:

> "a number of human rights are directly implicated in the context of a disaster, including the right to an adequate standard of living, including adequate food, clothing and housing, the right to the enjoyment of the highest attainable standard of physical and mental health, ~~and medical services,~~ the right to ~~the supply of~~ safe drinking water, ~~the right to adequate housing, clothing~~ and sanitation ...".

Later in the same paragraph, the following related edit should be made:

> "The Commission therefore notes that 'appropriate steps' to be taken by a State may include seeking international assistance where domestic conditions are such that the right to an adequate standard of living, including adequate

food, cannot be progressively realized and the affected State has an international obligation to progressively realize such a right."

See also the comments under draft article 4 concerning the definition of "affected State".

14. Draft article 14 [11]

Consent of the affected State to external assistance

Mexico

[See the comment above under draft article 4].

United States of America

The United States does not believe that draft article 14 [11] provides an accurate statement of the *lex lata*. In particular, the United States does not agree with the unqualified statement that "the provision of external assistance requires the consent of the affected State". It would be necessary to consider, based on all of the facts and circumstances, whether the provision of assistance for disaster relief or disaster risk reduction would otherwise violate the territorial integrity of the affected State or would violate the principle of non-intervention. For example, one could imagine a scenario involving a State in which the Government had completely collapsed and where it was not possible to find authorities who could provide consent. Another situation may be where a Security Council resolution applies.

The draft article reveals some of the limitations of framing the draft articles in terms of "rights" and "duties", particularly where such statements are not accurate reflections of existing international law. It could create confusion regarding the legally available options for States that seek to provide humanitarian assistance to persons affected by disasters. The United States suggests bringing the language of this draft article in line with General Assembly resolution 46/182, which states that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country". Similarly, and in line with the general comment that all of these draft articles should be framed as guidelines, the United States recommends changing "shall" to "should" in paragraphs 2 and 3 of the draft article. Again, for the reason stated with respect to draft article 2 [2] (paragraph (10) of the commentary) and draft article 13 [10] (paragraph (4) of the commentary), paragraph (4) of the commentary to draft article 14 [11] incorrectly bases a duty to consent to external assistance on the right to life, as set forth in the International Covenant on Civil and Political Rights, article 6, and suggests that withholding consent for such assistance in the context of a disaster may constitute a violation of the right to life. As support for this assertion, the commentary relies solely on a non-binding proposition, advanced by the Human Rights Committee in 1982, in its General Comment No. 6, that protection of "the inherent right to life" requires that States adopt positive measures and, by way of example, that the Committee considered "that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics." As desirable as such measures and goals may be, and they are certainly aspirations the United States shares, it does not consider such positive measures to be obligatory under the Covenant. The United States strongly recommends deletion

of any reliance on the right to life, including from paragraph (4) of the commentary to the draft article, as inapplicable to the context of disasters. Although reference to the United Nations General Assembly resolutions cited would not provide legal basis for recognizing a duty in this regard, the United States does not object to the factual statement expressed regarding the consequences for victims of natural disasters deprived of humanitarian assistance.

Paragraph (7) of the commentary offers important guidance on the meaning of the term "arbitrary" that should at least be referenced in the draft article. The United States recommends modifying the language of draft article 14 [11], paragraph 2, to read:

> "In accordance with applicable rules of international law and the national law of the affected State, and consistent with the present draft articles, consent to external assistance should not be withheld arbitrarily."

The United States would also recommend exploring in the commentary the relationship between the paragraphs of draft article 14 [11]. For example, it is not clear whether the arbitrary withholding of consent under paragraph 2 of the draft article would affect the consent requirement in paragraph 1, or whether the extreme situations described in paragraph (10) of the commentary, under which a State might be excused from making known its decisions on offers of assistance under paragraph 3 of the draft article, could also be relevant to evaluating a State's consent or withholding of consent under paragraphs 1 and 2 of the draft article.

15. Draft article 15 [13]

Conditions on the provision of external assistance

United States of America

The United States reiterates its view that the draft articles would be most useful as non-binding principles or guidelines. Accordingly, it suggests revising the text of draft article 15 [13] as follows:

> "Such conditions shall be in accordance with ~~the present draft articles~~, applicable rules of international law and the national law of the affected State, and should be consistent with the present draft articles. Conditions ~~shall~~ should take into account the identified needs of the persons affected by disasters and the quality of the assistance."

16. Draft article 16 [12]

Offers of external assistance

United States of America

The United States appreciates the recognition in the commentary that offers of assistance are "essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist". It also values the commentary's affirmation that offers of assistance made in accordance with the present draft articles may not be discriminatory in nature and should not be regarded as interference in the affected State's internal affairs.

The United States believes additional consideration is merited, however, of the distinction in this draft article between the relative prerogatives of assisting actors.

Draft article 16 [12] provides that States, the United Nations and other competent intergovernmental organizations have the "right" to offer assistance, whereas relevant non-governmental organizations "may" also offer assistance. The commentary suggests that this different wording was used for reasons of emphasis, in order to emphasize that States, the United Nations, and intergovernmental organizations are not only entitled but encouraged to make offers of assistance, while non-governmental organizations have a different nature and legal status. The United States suggests eliminating the distinction and providing instead that States, the United Nations, intergovernmental organizations and non-governmental organizations "may" offer assistance to the affected State, in accordance with international law and applicable domestic laws. Although there is no doubt that States, the United Nations and intergovernmental organizations have a different nature and legal status than that of non-governmental organizations, that fact does not affect the capacity of non-governmental organizations to offer assistance to an affected State, in accordance with applicable law.

The United States also believes that non-governmental organizations should be encouraged — like States, the United Nations and competent intergovernmental organizations — to make offers of assistance to affected States, in accordance with applicable law. Furthermore, States and relevant intergovernmental organizations may choose to support humanitarian relief efforts in an affected State by making grants or contributions to relevant non-governmental organizations, and the United States would not want to inadvertently discourage such methods of support by suggesting that non-governmental organizations should be treated differently by affected States.

17. **Draft article 17 [14]**

Facilitation of external assistance

Mexico

[See the comment above under draft article 4].

United States of America

In line with its general comments, the United States believes the draft article would be more beneficial as a guiding principle, rather than framed as an obligation. Accordingly, it would recommend changing "shall" to "should" in both paragraphs of this draft article. If it remains framed as an obligation, it should be clearly identified as progressive development of the law.

Furthermore, to be consistent with other draft articles, the United States recommends revising the first clause of draft article 17 [14] to read: "the necessary and appropriate measures ...". Although certain measures within the affected State's national law may be necessary to facilitate the provision of assistance, those measures must also be appropriate given the unique circumstances of each disaster.

The United States appreciates the emphasis the draft article places on the importance of the affected State taking the necessary measures within its national law to facilitate the prompt and effective provision of external assistance regarding relief personnel, goods and equipment — in particular, among other things, with respect to customs requirements, taxation and tariffs. Such steps can address a major and avoidable obstacle to effective assistance. Indeed, because the United States

agrees with the idea that it is generally beneficial for an affected State to take steps to exempt external disaster-related assistance goods and equipment from tariffs and taxes in order to reduce costs and prevent delay of goods, it would suggest that paragraph (5) of the commentary recommend that States should waive them, rather than suggest that States could lessen them as an alternative. Along similar lines, the draft article contains an illustrative list of measures for facilitating the prompt and effective provision of external assistance. The United States suggests adding to that list measures providing for the efficient and appropriate withdrawal and exit of relief personnel, goods and equipment upon termination of external assistance. States and other assisting actors may be more likely to offer assistance if they are confident that, when the job is done, their personnel, goods and equipment will be able to exit without unnecessary obstacles.

18. Draft article 18

Protection of relief personnel, equipment and goods

Mexico

[See the comment above under draft article 4].

United States of America

The United States strongly supports efforts to improve the safety and security of humanitarian personnel, as well as efforts to promote effective and timely delivery of humanitarian assistance. Furthermore, it agrees that States should afford at least the same protections to relief personnel, equipment and goods as they would to all other persons and property that they have accepted within their territory, in accordance with their obligations under national and international law.

However, the United States is again concerned that this principle is framed as a legal obligation particular to relief personnel, equipment and goods, without a clear explanation as to the source of such an obligation under international law. Thus, it recommends changing "shall" to "should". If it is retained as a statement of legal obligation, it should be clearly labelled as progressive development of the law.

In addition, the United States suggests making the language of draft articles 17 [14] and 18 more consistent by including an express reference to national law in draft article 18:

"the appropriate measures, <u>within its national law</u>, to ensure ...".

The United States is pleased that paragraph (8) of the commentary addresses the need to evaluate security concerns, having in mind effective delivery of assistance, although it would benefit from further explanation of what constitutes "unreasonable and disproportionate hurdles" for relief activities.

19. Draft article 19 [15]

Termination of external assistance

Mexico

[See the comment above under draft article 4].

United States of America

The United States appreciates that paragraph (5) of the commentary clarifies that "decisions regarding the termination of assistance are to be made taking into consideration the needs of the persons affected by disaster". Ideally, the commentary would specifically recommend that actors consult with the affected populations on whether their needs have been met, rather than having the various actors and States make that determination.

In line with our comments on other draft articles that are currently phrased in terms of obligations, the United States suggests changing "shall" to "should" in both sentences of draft article 19 [15].

20. Draft article 20

Relationship to special or other rules of international law

United States of America

The United States would recommend converting these draft articles into a non-binding statement of principles or guidelines. In that case, it supports the inclusion of this draft article to clarify that the principles do not prejudice States' existing rights and obligations under international law; however, the United States would recommend deleting "special or other".

If these draft articles remain in the present form, the United States would appreciate further clarification of the intent and language of this draft article. As noted in the commentary, the doctrine of *lex specialis* already addresses the applicability of potentially overlapping bodies of law, and it is unclear what this draft article, as currently drafted, adds to that principle.

21. Draft article 21 [4]

Relationship to international humanitarian law

Mexico

Mexico considers it imperative to include this draft article, as it rules out the application of the draft articles in cases solely involving an armed conflict. However, a provision should be added to the draft article to cover cases in which an armed conflict exists at the same time as a disaster occurs.

Mexico suggests that, in accordance with the *lex specialis* principle,[13] the application of the draft articles in situations of armed conflict be permitted insofar as there are no rules applicable to the particular case that are derived from international humanitarian law or that do not run counter to its purposes or application.

United States of America

[See the comments above under draft article 3 [3]].

The United States recognizes that the Commission has grappled with the interaction between the draft articles and the rules of international humanitarian law,

[13] See article 55 of the articles on responsibility of States for internationally wrongful acts. See also General Assembly resolution 56/83 of 12 December 2001, annex, as corrected by document A/56/49 (Vol. I)/Corr.4.

and appreciates the inclusion of draft article 21 [4], which attempts to preserve the operation of international humanitarian law by declaring that the draft articles "do not apply to situations to which the rules of international humanitarian law are applicable". The United States believes, however, that relying solely on draft article 21 [4] does not sufficiently protect the integrity of international humanitarian law and would be impractical to implement. The phrasing of draft article 21 [4] is helpful insofar as it refers broadly to "situations" to which the rules of armed conflict apply — suggesting that when international humanitarian law is generally applicable to a situation (such as a "situation" of armed conflict) the draft articles do not come into play — but the commentary suggests a different approach, explaining that the draft articles "can ... apply in situations of armed conflict to the extent that existing rules of ... international humanitarian law ... do not apply." The plain wording of draft article 21 [4] appears to contemplate that the draft articles would not be applicable in such situations.

Thus, to eliminate any confusion, the United States suggests the following revision of the last sentence of paragraph (3) of the commentary to draft article 21 [4]: "Although the draft articles do not regulate the consequences of armed conflict, they can nonetheless apply in relation to disasters that happen to coincide with situations of armed conflict to the extent that the activities are not governed by international humanitarian law."

In addition, the United States recommends modifying draft article 21 to eliminate its exclusive reference to "rules" of international humanitarian law. The current reference to "rules" could, on the one hand, cause the draft article to be applied more broadly than intended. As noted by the International Court of Justice and by the Commission in the draft commentary, certain rules of international humanitarian law (such as the fundamental guarantees of humane treatment for detained persons stated in common article 3 of the 1949 Geneva Conventions) reflect "elementary considerations of humanity" that also may be applied outside the context of armed conflict. Because the application of a specific rule of international humanitarian law arguably would not necessarily mean that international humanitarian law was applicable, the reference to "rules of international humanitarian law" being applicable might be misinterpreted to suggest a broader exclusion than was intended.

The current reference to "rules of international humanitarian law" could also be misinterpreted to make draft article 21 [4] apply more narrowly than intended. As noted above, international humanitarian law is often viewed as a series of negative — that is, prohibitive or restrictive — rules, with the absence of a rule indicating that States may act. In such situations, although a specific "rule" of international humanitarian law would not apply, the principles of international humanitarian law form a general guide for conduct. In the view of the United States, the draft articles should not be applied to situations where international humanitarian law, including its principles, apply, but States have not accepted a restrictive or prohibitory rule, with a view to preserving their flexibility to conduct armed conflict as warranted by military necessity. In light of the foregoing, the United States recommends modifying draft article 21 [4] to read:

> "The present draft articles do not apply to <u>activities which are governed by international humanitarian law, including its principles and rules</u>."